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ONTARIO LABOUR RELATIONS BOARD REPORTS



April 1988



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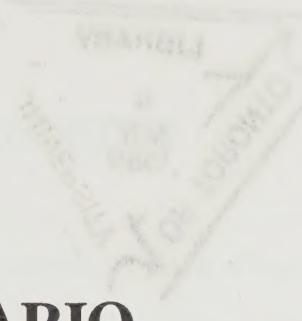
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ONTARIO

LABOUR RELATIONS BOARD

REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1988] OLRB REP. APRIL

EDITOR: COLLEEN EDWARDS

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards*
Reports, Butterworth & Co., Toronto.



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1634-87-U International Woodworkers of America, Complainant v. Atway Transport Inc., Respondent

Evidence - Unfair Labour Practice - Board ruling on admissibility of photocopies of computer print-outs - Weight to be given to documents may be affected if underlying documentation cannot be produced for inspection by opposing counsel - Scope of summons *duces tecum* explored - Documents pertaining to collateral matters not compellable

BEFORE: Robert D. Howe, Vice-Chair, and Board Members R. M. Sloan and J. Sarra.

APPEARANCES: W. Dubinsky, Ed Kidd, Lyle Pona and Wilf McIntyre for the complainant; D. F. Nelson and Y. L. J. Fricot for the respondent.

DECISION OF THE BOARD; April 12, 1988

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that the grievor, Edward Kidd, has been dealt with by the respondent contrary to the provisions of sections 66 and 70 of the Act. In its reply to the complaint, the respondent submitted that the grievor was not an employee of the respondent but was at all material times an independent contractor. At the commencement of the hearing of this complaint, the parties agreed that the Board should hear evidence and argument concerning that issue as a preliminary matter. The purpose of this decision is to record certain oral rulings which were made by the Board during the course of hearing evidence regarding that issue.

2. On April 6, 1988, the Board made the following unanimous oral ruling concerning the admissibility of photocopies of certain computer print-outs ("photocopies 1, 1A, 2, 3, and 4") which the respondent sought to introduce as exhibits:

Subject to the respondent producing the original computer print-outs from which photocopies 1, 1A, and 2 have been made, so that the photocopies can be compared with the originals, we are prepared to admit those photocopies as exhibits in these proceedings once they have been identified by Mr. Perrier. If the respondent fails to produce, for inspection by Mr. Dubinsky, the underlying documentation, if any, which forms the basis of those print-outs, that may well affect the weight, if any, to be given to those print-outs. However, that is a matter which may be left for final argument.

With respect to photocopies 3 and 4, we are not prepared to admit them as exhibits unless Mr. Dubinsky is provided with the originals from which they were photocopied and is provided with the names of the persons to whom the information contained in them pertains. In this regard, we recognize the sensitive nature of that financial information, but are of the view that Mr. Dubinsky is entitled to know the names in order to verify the validity of the information and to be in a position to meaningfully cross-examine on that material. We would also note that confidential information received during the course of a Board hearing can only be used by a party or party's representative for purposes of the hearing, and that the use of that information for extraneous purposes would constitute contempt of the Board.

3. On April 7, 1988, the Board made the following unanimous oral ruling regarding production of documents pursuant to a summons *duces tecum* which the complainant had caused to be

served on persons including Robert Halstead and Claude Perrier, the first two witnesses called by the respondent in this matter:

Having carefully considered the submissions of the parties and the case law to which we have been referred, we have reached the following conclusions. The approach which the Board has adopted with respect to the production of documents pursuant to a summons *duces tecum* is now well established in the Board's jurisprudence. A summons *duces tecum* is not to be used as a search warrant or to permit a party to search for a case of which it has no knowledge. However, as noted by the Board in *Mollenhauer Limited*, [1987] OLRB Rep. Sept. 1156, at paragraph 5, "a party seeking production of documents through a summons need not demonstrate any more than that the documents are arguably relevant to the matters in issue". See also *Forintek Canada Corp.*, [1985] OLRB Rep. July 1050; *Dinnerex Incorporated*, [1985] OLRB Rep. March 398; *Gordon-Nelson Development Company Limited*, [1984] OLRB Rep. June 807; *Shaw-Almex Industries Limited*, [1984] OLRB Rep. April 659; and *The Becker Milk Company Limited*, [1974] OLRB Rep. Oct. 732.

Having regard to the principles set forth in those decisions, we have concluded that the following documents must be produced in the circumstances of the instant case:

- (1) the respondent's payroll documents for 1987 in respect of each of the drivers characterised by the respondent as "employees" and each of the drivers characterised by the respondent as "contractors", and
- (2) all contracts signed with drivers characterised by the respondent as "contractors" who performed work for the respondent in 1987.

We are of the view that these two groups of documents are of arguable relevance to the preliminary issue of whether the grievor, Edward Kidd, was an employee of the respondent at the time of his termination, as contended by the complainant, or an independent contractor, as contended by the respondent. In this regard, we note that some payroll information regarding persons other than the grievor has already been ruled admissible at the behest of the respondent (namely, a computer print-out referred to as "photocopy 3"). To deny the complainant access to payroll documents concerning other drivers would be to permit the respondent to place material before the Board on a selective basis. With respect to the contracts, we note that samples of these documents have already been introduced as exhibits (34 and 35) by the respondent. Moreover, production of those documents is of arguable relevance to the matter of whether the grievor is the only one of the persons characterised by the respondent as "contractors" who has not signed such a contract. This in turn may well have a bearing on whether Mr. Kidd is or is not an independent contractor.

We are not prepared to direct production of any of the other documents sought by the complainant as Mr. Dubinsky has not demonstrated that they are arguably relevant to the issue before us, i.e., whether Mr. Kidd was at

the material time an employee of the respondent or an independent contractor. In our view, the other documents sought by the complainant all pertain to collateral matters, and would not assist us in deciding the issue of Mr. Kidd's status vis-a-vis the respondent.

In directing production of the aforementioned documents, we note that there is an implied undertaking by a party to whom documents are produced, pursuant to a summons *duces tecum*, that the documents will not be used for collateral or ulterior purposes (see, for example, *Shaw-Almex Industries Limited, supra*). We also note that in the instant case that implicit undertaking has been made explicit by Mr. Dubinsky, who has undertaken on behalf of himself and on behalf of the complainant that the documents produced by the respondent in these proceedings will be used only for purposes of these proceedings and not for any other purpose.

4. Later that day, the Board made the following unanimous oral ruling concerning the admissibility of five other computer print-outs ("computer print-outs #1 to #5"), and concerning a clarification sought by Mr. Fricot (of counsel for the respondent) regarding the ruling set forth in the preceding paragraph of this decision:

Having considered the submissions of the parties concerning the admissibility of computer print-outs #1 to #5, we are unanimously of the view that they are inadmissible insofar as they pertain to 1986. In this regard, we note that in the ruling which we made this morning concerning documents to be produced pursuant to a summons *duces tecum*, we ruled that payroll documents for 1987 in respect of each of the drivers characterised by the respondent as "employees" and each of the drivers characterised by the respondent as "contractors" must be produced in the circumstances of this case. That ruling rejected the complainant's request for production of payroll documents for 1986 and 1985 on the ground that they, and numerous other documents sought by the complainant, are not arguably relevant to the issue of Mr. Kidd's status vis-a-vis the respondent at the material time. The same is true of the computer print-outs which the respondent now seeks to introduce, insofar as they pertain to 1986. In conformity with yesterday's ruling in respect of photocopies 3 and 4, we are not prepared to admit those parts of computer print-outs #1 to #5 which pertain to 1987 unless Mr. Dubinsky is provided with the names of the persons to whom the information contained in them relates. As was the case with photocopies 3 and 4, we recognize the sensitive nature of the information contained in computer print-outs #1 to #5, but are of the view that Mr. Dubinsky is entitled to know the names in order to verify the validity of that information and to be in a position to meaningfully cross-examine on that material. Our earlier comments regarding Mr. Dubinsky's undertaking in respect of the use to be made of documents produced by the respondents in these proceedings are, of course, equally applicable to computer print-outs #1 to #5.

Mr. Fricot has also asked the Board to clarify our earlier ruling regarding production pursuant to the summons *duces tecum*, by indicating whether the production ordered therein is tied to the respondent's introduction of photocopy 3 and Exhibits 34 and 35. (Exhibit 34 was introduced by the respondent through its first witness, Robert Halstead. After Mr. Halstead identified that

document, it was marked as an exhibit. Mr. Halstead was unable to identify the document which has been marked as Exhibit 35. However, it was received by the Board and marked, subject to the respondent's undertaking to prove it through another witness.) In response to that request, we hereby expressly indicate that the production ordered therein is not tied to the respondent's introduction of those documents. We have directed production of the documents covered by that ruling on the basis that they are arguably relevant to the issue of whether Edward Kidd was an employee of the respondent at the time of his termination or an independent contractor. Our view that such information and documentation is arguably relevant to the issue before us is also what prompted us to rule that photocopy 3 may be admitted (under the conditions specified in our ruling concerning that document) and to admit Exhibits 34 and 35. The unfairness which would result if the Board were to receive those documents but not permit the complainant to obtain production of similar documents is merely another independent basis for that ruling.

5. This matter has already been listed for continuation of hearing in Thunder Bay on June 6, 1988. The following additional continuation dates have been set by the Board, in consultation with the parties: July 26 and 27, August 16 and 17, and September 12 and 13, 1988. The matter is referred to the Registrar to be listed for continuation of hearing in Thunder Bay on those dates.

1797-87-R International Union of Operating Engineers, Local 793 v. Bill Brownlee Excavating Limited, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Construction Industry - Principles enunciated in *Gilvesy* confirmed - Employees primarily engaged in the repairing of equipment falling within unit - Mechanics repairing equipment both on and off the construction sites - Board finding that mechanics who regularly perform both repair work at the construction site and in the shop are commonly associated in their work with on-site employees and are therefore in the operating engineers bargaining unit - Mechanics in issue falling within unit - Vote ordered

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *W. Gibson* and *D. A. Patterson*.

APPEARANCES: *Bernard Fishbein, P. Bertrand* and *R. Kerr* for the applicant; *Daniel Kimmel* and *Peter Galway* for the respondent; *J. A. Emond* and *H. Wilson* for the group of employees.

DECISION OF THE BOARD; April 28, 1988

1. This is an application for certification made pursuant to the construction industry provisions of the *Labour Relations Act*.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on July 13, 1978, the designated employee bargaining agency is the International Union of Operating Engineers and Local 793 of the International Union of Operating Engineers.

3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application which relates to the industrial, commercial and institutional sector of the construction industry and is made pursuant to section 144(1) of the Act which provides:

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

4. Pursuant to section 144(1) of the *Labour Relations Act* and having regard to the agreement of the parties, the Board finds that all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The parties disagreed over the list of employees in the bargaining unit, and as a result, a Labour Relations Officer was authorized to make the requisite inquiries and report back to the Board. Pending the completion and submission of the Officer's report, the Board concluded hearing the evidence and representations of the parties with respect to a timely statement expressing opposition to the application. The Board, by decision dated March 30, 1988, held that the statement expressing opposition did not have sufficient weight to cause the Board to exercise its discretion under section 7(2) of the *Labour Relations Act* to order a representation vote.

6. The hearing reconvened before the Board in Ottawa on April 8, 1988 to receive the representations of the parties with respect to the report of the Labour Relations Officer which related to the list of employees in the bargaining unit.

7. The applicant challenged the inclusion of seven persons on the list of employees in the bargaining unit as of the application date. While all seven persons were employees of the respondent and were working for the respondent on the application date, the applicant contended that all seven persons were not employed in the bargaining unit on that date and therefore should not be considered for purposes of making the requisite calculations under sections 144 and 7 of the Act. The respondent submitted that all of the challenged employees were performing bargaining unit work on the application date and in any event, submitted that if they did not actually work within the bargaining unit on the application date, the Board should look at more than just the application date to characterize the employment of the employees in dispute.

8. In determining whether an employee is employed within a bargaining unit for purposes of an application for certification made under the construction industry provisions of the *Labour*

Relations Act, the Board is required by section 7(1) of the Act to assess the circumstances at the time the application is made. Generally, the Board looks to whether a person was actually at work for the employer on the application date. If an employee was not actually working on the application date, then the Board does not ordinarily consider that person in making the determinations required by sections 7(2) and 144(2) of the Act. See *Smith's Construction Arnrior Limited*, [1984] OLRB Rep. March 521 at 522. If an employee was working for the employer at the time the application was made, the Board then decides whether that person was employed within the bargaining unit at that time. The Board in the past had made that determination by examining the nature of the employee's work over a period of time prior to the application that was said to be "representative" of the typical work that the employee in question performed. See *Des-Build Development Limited*, [1983] OLRB Rep. Nov. 1793; *J. & M. Chartrand Realty Limited*, [1978] OLRB Rep. May 423; *Di-Marco Plumbing and Heating Company Limited*, [1985] OLRB Rep. May 659. More recently, however, the Board has made that determination by having regard principally to the work done by the disputed employee on the application date. See *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41 at 44; *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220 at 225.

9. In *Delco Contractors*, [1987] OLRB Rep. June 830 the parties agreed that the Board should apply the test set out in *Gilvesy, supra*, to determine whether an employee hired as a carpenter and who performed carpentry work extensively was an employee in the bargaining unit comprised of carpenters for the purposes of an application for certification. On the application date, the employee in question was engaged in chipping of concrete and not carpentry work. Thus, the Board held that as he did not spend the majority of his time on the application date working at the carpentry trade, he was not an employee in a bargaining unit comprised of carpenters.

10. The Board noted in *Gilvesy, supra*, and *E & E Seegmiller, supra*, that if the evidence was inconclusive with respect to the work performed by the disputed employee on the application date, then any other relevant factor, such as the primary reason for hire, would be considered in determining whether an employee, who was at work on the application date, was employed within the bargaining unit.

11. Counsel for the respondent argued that the Board should not restrict itself to the application date in determining whether employees working for the respondent were employed in the bargaining unit. In our opinion, the approach taken by the Board in *Gilvesy, supra*, and *Seegmiller, supra*, is consistent with the Board's approach in construction industry applications generally. The circumstances of employment may vary over time, and in the construction industry in particular, employment may change from day to day. Indeed, the policy underlying the Board's approach to holding that in a construction industry certification application, an employee must be actually at work on the application date in order to be counted applies with equal force to determining whether that employee was employed in the bargaining unit.

12. In an application for certification the Board is making determinations as to whether an employee is in the bargaining unit as of the time an application for certification is made. Even though circumstances may be constantly changing, the Board must examine those circumstances at an instant in time to make the requisite determinations under section 7 and 144 of the Act. Therefore, we are not persuaded that we should depart from the Board's approach in determining whether an employee is in the bargaining unit discussed in *Gilvesy, supra*, and *E & E Seegmiller, supra*.

13. There were seven employees who the respondent contended were employees in the bargaining unit on the application date whom the applicant challenged.

Harvey Wilson and Lucien Beauregard

14. Harvey Wilson was employed as a tandem truck driver who delivered material on occasion to construction sites. While Mr. Wilson indicated that he occasionally operated a bulldozer or loader, the evidence is clear that on the application date he spent a majority of his time as a truck driver, and not as an equipment operator.

15. Lucien Beauregard was employed by the respondent as the operator of a power sweeper. Generally, he operated the sweeper to clean parking lots and other asphalt surfaces. He did not generally work at construction sites, and on the application date, was operating the power sweeper. Mr. Beauregard has, in the past, worked as a power shovel operator and also did minor repairs to the power sweeper he operated. Mr. Beauregard was not performing construction work on the application date.

Edgar Regimbauld

16. Edgar Regimbauld was hired as a mechanic by the respondent. He also worked as a float driver, transporting construction equipment. On the application date, he fuelled the tractor he was to drive and then drove to various locations transporting construction equipment such as shovels and a bulldozer. Mr. Regimbauld generally operates the construction machinery to load and unload it from the float. Mr. Regimbauld also worked with the mechanics on occasions, but on the day of application, it is clear that he spent a majority of his time working as a float driver.

Blair Harris

17. Blair Harris was employed by the respondent as a backhoe operator. While he generally operated equipment on a construction site, on the application date he worked for only one hour operating a loader loading topsoil at the premises of the respondent. Mr. Harris was not engaged in construction work on the application date because of the weather. Mr. Harris also drove the float on occasion and sometimes did mechanical work on the equipment he operated.

Greg Grant

18. Greg Grant was employed by the respondent as an apprentice mechanic. He drove a fuel truck and also assisted the mechanics in repairing and maintaining equipment. Mr. Grant fuelled the construction equipment, such as shovels, bulldozers, excavators and backhoes by driving the fuel truck to the job sites where that equipment was located. He also changed the oil and filters on the equipment and assisted the mechanics in repairs. On the application date, Mr. Grant worked assisting a mechanic on repairs of a machine for approximately two hours. The balance of the day was spent by him travelling to the various job sites fuelling equipment and also performing some work in the shop.

Ken Hart Sr.

19. Ken Hart Sr. is an equipment mechanic. He repairs and maintains construction equipment and vehicles owned by the respondent. The respondent has a shop where Mr. Hart reports and as the need arises is dispatched to repair construction equipment at the job sites. On the day of application, he did not leave the shop but spent the entire day working on construction equipment. In the month previous to the application he was dispatched to perform repairs to construction equipment on site on 10 different days, spending almost the entire day or majority of those days at the construction site.

Athanasiros Tsaussis

20. Athanasiros Tsaussis is an equipment mechanic. On the application date, he spent a substantial majority of his time doing mechanical repairs to the construction equipment at the job sites. Mr. Tsaussis indicated that he typically will spend half of his work day on-site repairing construction equipment. Mr. Hart Sr. and Mr. Tsaussis work together, and according to Mr. Hart Sr., either of them may be dispatched to a construction site, depending on who is available.

21. The bargaining unit which the applicant seeks to represent does not include truck drivers. See *Armbro Materials and Construction Limited*, [1973] OLRB Rep. Aug. 450 at 451; *Clairson Construction Company Limited*, [1967] OLRB Rep. Sept. 606 at 607; *Bruno's Contracting (Thunder Bay) Limited*, [1985] OLRB Rep. Dec. 1701; *Jim Bertram & Sons Construction Ltd.*, Board File No. 1815-85-R, June 13, 1986, unreported and *Cedarhurst Paving Company Limited*, [1964] OLRB Rep. Dec. 442. Persons who drive floats engaged in the transportation of construction equipment on and off construction sites are considered truck drivers employed in the construction industry. See *Canadian Asphalts Limited*, [1980] OLRB Rep. March 299 at 303; *Cooper's Crane Rental Limited*, [1980] OLRB Rep. Sept. 1286; *Cedarhurst Paving Company Limited*, *supra*, at 445. Similarly, an employee who drives a fuel truck and who services construction equipment is also a truck driver employed in the construction industry. See *Canadian Road Asphalts Limited*, *supra*, *Cedarhurst Paving Company Limited*, *supra*.

22. Therefore, Harvey Wilson, Edgar Regimbauld and Greg Grant were not employees in the bargaining unit on the application date since they spent a majority of their time on that day engaged in the trade of truck driver, and not in the trade of operating engineer.

23. Additionally, since both Lucien Beauregard and Blair Harris were not engaged in construction work on the application date, they also were not employees in the bargaining unit on that date.

24. Ken Hart Sr. and Athanasiros Tsaussis are both mechanics who worked on the repair and maintenance of construction equipment. The bargaining unit includes within it "employees primarily engaged in the repairing and maintaining" of the equipment operated by the other employees in the bargaining unit. Generally employees who are primarily engaged in the repairing and maintaining of equipment come within the applicant's bargaining unit if they are working at a construction site and not within a shop. In *J & M Chartrand Realty Limited*, *supra*, the Board wrote at 426:

"At the relevant time the respondent operated a gravel pit utilizing the gravel both for its own purposes and to sell to other companies in the Timmins area. Mr. Ernest Cloutier, who appears on the list of employees, was at the relevant time employed at the pit as the operator of a loader. The Board is of the view that the respondent's gravel pit operation does not come within the construction industry and that the employee involved would more appropriately be included in an industrial bargaining unit. (See: *Fielding Construction Company*, [1970] OLRB Rep. Jan. 1205). This being the case the Board is satisfied that on the application date Mr. Cloutier was not an employee in the bargaining unit.

The respondent employs a number of men at its repair shop to do repair and maintenance work on both construction equipment and trucks. The Board's general practice is to regard as coming within construction industry bargaining units of operating engineers those employees who work on construction sites and are primarily engaged in the repair and maintenance of cranes, shovels, bulldozers and similar equipment, but to regard as being outside the scope of such units employees who work in repair shops. Generally repair shop employees will be included in industrial bargaining units. (See *Fielding Construction Company*, op. cit.) In the instant case the employees involved are based in the repair shop and most of the respondent's maintenance and repair work seems to be done at the shop. Frequently, however, the shop employees do go into

the field to do maintenance and minor repair work on equipment. Notwithstanding this latter fact, the Board is satisfied that the employees based in the shop are, as a group, essentially off-site employees who would be more appropriately included in an industrial bargaining unit with other off-site employees rather than in a unit with on-site construction employees.

Having regard to the above conclusion, and for the purposes of clarity, the Board declares that employees based in the respondent's repair shop do not come within the bargaining unit."

25. The Board in *J & M Chartrand Realty Limited* referred to *Fielding Construction Company Limited*, [1970] OLRB Rep. Jan. 1205 where the Board distinguished between construction and non-construction activities and noted at page 1206 that employees who work in shops, yards or quarries were not employed in the construction industry. Thus, shop employees were excluded from a construction industry bargaining unit. *Fielding Construction Company Limited, supra*, was dealt with by the Board prior to the introduction of what is now section 117(b) into the Act.

26. Section 117(b) of the *Labour Relations Act* provides:

"117. In this section and in sections 118 to 136,

• • •

(b) 'employee' includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees."

Employees who are off-site and who only very briefly go on site irregularly are not commonly associated in their work with on-site employees. See *Taggart Construction Limited*, [1974] OLRB Rep. March 190; *Warren Bitulithic Limited*, [1981] OLRB Rep. March 376 at 360. Shop employees whose work is merely preparatory to the work done on-site are also not employees within the meaning of section 117(b). *C.A. Pitts Engineering Construction Limited*, [1973] OLRB Rep. Feb. 123. Employees who regularly work both in a shop and on-site are commonly associated in their work with on-site employees. *Esam Construction Limited*, [1980] OLRB Rep. Feb. 197; *Metro Railing Limited*, [1986] OLRB Rep. Dec. 1731; *Pickering Welding and Steel Supply*, [1987] OLRB Rep. April 595.

27. The Board in *J & M Chartrand Realty Limited, supra*, made no reference to what is now section 117(b) when concluding that equipment mechanics who work both on and off a construction site are excluded from a construction industry bargaining unit.

28. The Board in *Esam Construction Limited, supra*, held that two employees who performed repair work on the employer's construction equipment at the construction site and also worked at the employer's premises were employees in the construction industry and were included in an operating engineer's bargaining unit. The Board wrote at page 202:

"The Board now considers the list of employees for the purpose of the count. Prior to the enactment of *The Labour Relations Amendment Act, 1970 (No. 2)*, S.O. 1970, c.85, s.39, the Board excluded shop and yard and other off-site employees from bargaining units which were determined in applications for certification filed under the construction industry provisions of *The Labour Relations Act*. The enactment in 1970, however, introduced a broad definition of 'employee' in the construction industry. This definition now appears in section 106(b) [now 117(b)] of the Act. Section 106(b) [now 117(b)] states:

'In this section and in sections 107 to 124.

• • •

(b) 'employee' includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees.'

In the *Taggart Construction Limited* case, [1974] OLRB Rep. March 190; and the *C. A. Pitts Engineering Construction Ltd.* case, [1973] OLRB Rep. Feb. 123, the Board considered the provisions of section 106(b). In those two cases the Board determined that if off-site employees were only rarely, uncommonly and briefly required to work on-site they were not appropriate for inclusion with on-site employees. In the instant application Mr. Chelchowski and Mr. Dunham were not working on the construction site on April 2, 1979. However, these two employees clearly do spend time on the construction site on other days on a regular basis and the Board finds that they are commonly associated in their work with on-site employees within the meaning of section 106(b). The Board therefore includes Mr. Chelchowski and Mr. Dunham on the list for the purpose of the count because they are engaged in either operating or repairing equipment referred to in the bargaining unit."

The Board in *Esam Construction Limited*, *supra*, did not refer to the Board's earlier decision in *J & M Chartrand Realty Limited*, *supra*.

29. In 590308 *Ontario Inc.*, Board File No. 0915-87-R November 26, 1987, unreported, the Board, without referring to section 117(b) of the Act or *Esam Construction Limited*, *supra*, held that equipment mechanics, one of whom spent more time away from the repair shop than the other two mechanics, should all be excluded from a construction industry bargaining unit. The Board, after setting out the second paragraph quoted above from *J & M Chartrand Realty Limited* wrote at page 3:

"In the instant case, Messrs. Messier and Munday are mechanics who spend the overwhelming majority of their work hours in the shop, repairing trucks and construction equipment. Each of them goes into the field to perform repair work on construction machinery only about once a week. Although Mr. Hone goes into the field more frequently, and spends a greater proportion of his time away from the repair shop, he is nevertheless one of the respondent's group of three mechanics who, in our view, would be more appropriately included in an industrial bargaining unit (along with their helper, whose name does not appear on the employer's list) than in a unit with on-site construction employees."

30. It is clear from the evidence that Mr. Tsassis spent a large majority of his time on the application date repairing construction equipment at the work site. It was also apparent that both he and Ken Hart Sr. are frequently dispatched to repair equipment at construction sites although they often perform repair work in the shop at the respondent's premises.

31. Counsel for the applicant submitted that both of the mechanics ought to be treated in the same way for purposes of this application and be excluded from the bargaining unit because they are primarily shop employees. Counsel relied principally on *J & M Chartrand Realty Limited* and 590308 *Ontario Inc.*

32. The respondent uses the same mechanics to repair and maintain construction equipment both on and off the construction sites. On the day of application, Mr. Tsassis was clearly engaged in bargaining unit work on the construction site. While Mr. Hart Sr. was at work in the respondent's shop on the application date, in our view, both he and Mr. Tsassis are primarily engaged in the repair and maintenance of the construction equipment operated by the other employees in the bargaining unit. They are often dispatched to construction sites to perform repair work on the equipment. It does not appear that the respondent operates a repair shop where other than the mechanics who are regularly and routinely dispatched to the construction sites are employed. Thus, we are of the view that the mechanics who regularly perform both repair work at

the construction site and in the shop are commonly associated in their work with on-site employees.

33. It is evident that Mr. Tsauisis was engaged in the repair of construction equipment at the construction site on the application date. While Mr. Hart Sr. was not dispatched to a construction site on that day, we have determined that because he is commonly associated in his work with on-site employees when engaged in the repairing and maintaining of construction equipment in the circumstances of this case, he was also an employee in the bargaining unit on the date the application was made. Thus, Ken Hart Sr. and Athanasios Tsauisis are both included in the bargaining unit for purposes of the count.

34. Therefore, the Board finds that there were thirteen employees in the bargaining unit on the application date. The applicant filed six combination applications for membership and one certificate of membership in respect of those thirteen employees.

35. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent and not more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 22, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

36. A representation vote will be taken of the employees of the respondent in the bargaining unit. All those employed in the bargaining unit on the date hereof who are so employed on the date the vote is taken will be eligible to vote.

37. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

38. The matter is referred to the Registrar.

2765-87-U International Brotherhood of Electrical Workers, Local 1744, Complainant v. Boise Cascade Canada Limited, Respondent

Arbitration - Interference in Trade Unions - Unfair Labour Practice - Employer starting apprentice at a higher rate of pay than other apprentices - Union asserting that employer obliged to make apprenticeship arrangements through a Joint Apprenticeship and Training Committee - Board deferring to arbitration

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *D. A. MacDonald* and *R. R. Montague*.

APPEARANCES: *S. B. D. Wahl* and *D. Langtry* for the complainant; *Peter Thorup*, *Jim Gartshore*, *Len Robinson*, *Gord Cornell* and *John Payne* for the respondent.

DECISION OF THE BOARD; April 22, 1988

1. In August 1987, the respondent, Boise Cascade Canada Limited ("Boise Cascade" or "the company"), informed the complainant, International Brotherhood of Electrical Workers, Local 1744 ("the union" or "Local 1744"), that it was planning to hire four new apprentice electricians. Boise Cascade decided that one of the apprentices it hired, Jeff Steinke, would be paid at the third year apprenticeship rate because of his experience and background. The other three apprentices were paid the first year rate, although subsequently the company did request the Ministry of Colleges and Universities to re-assess the number of hours they would be credited towards the number required for completion of the apprenticeship. The union took the position that a decision such as that made about Mr. Steinke could be made only by the Joint Apprenticeship and Training Committee ("the Joint Committee") pursuant to article 3101(a) of the collective agreement between the company and the union. The company, on the other hand, contended it had the right to make that determination, regardless of any involvement by the Joint Committee. Local 1744 filed a grievance that the company had violated the collective agreement which went to the third stage of the grievance procedures but has not yet gone to arbitration. The union then filed this complaint with the Board, alleging that Boise Cascade's conduct in starting Mr. Steinke at the third year rate is a contravention of sections 64, 66 and 67 of the *Labour Relations Act* ("the Act"). The union says that the company has bargained directly with Mr. Steinke and has usurped the union's function as the sole bargaining agent of the employees it represents.

2. In its complaint, the union seeks cease and desist orders, an order of compliance with an agreement the union says provides for a role-back of Mr. Steinke's wages, an order that the company "be required to reach agreement with the [union] with respect to all apprenticeship issues including those relating to [Mr. Steinke's] wage rate and apprenticeship standing under the auspices of the [Joint Committee] and damages. In argument, counsel characterized the relief the union was seeking as "equal treatment across the board of all apprentices" and "mak[ing] sure that the union through the Joint Committee participates in decisions about particular apprenticeship arrangements".

3. The company raised a preliminary motion that we decline to hear the complaint and defer to arbitration. Among his other submissions in response to the company's motion, counsel for the union argued that the complaint deals with matters going beyond the collective agreement: he referred to a jurisdictional dispute currently before the Board in which the International Association of Machinists and Aerospace Workers' Local 771 ("the I.A.M.") is seeking to have all instrumentation work at Boise Cascade's pulp and paper mill in Fort Frances assigned to it, whether it be pneumatic, hydraulic or fluidic instrumentation (currently performed by members of the I.A.M.) or electrical or electronic (currently being performed by Local 1744) (see Board File No. 2747-87-JD). Local 1744's position in that dispute is that the status quo be maintained; the company's first position is that Local 1744 be assigned all the work and, in the alternative, that the status quo prevail. Counsel suggests that the treatment of Mr. Steinke, who was a member of the I.A.M. employed at Boise Cascade before he became an apprentice electrician and member of Local 1744, is an attempt by the company to accomplish the distribution of work it has requested in the jurisdictional dispute. The union does not make a specific allegation with respect to the company's motive in treating Mr. Steinke as it did, but counsel argues that that treatment should be assessed against the background of the jurisdictional dispute and the suggested motive taken into account in determining whether the complaint goes beyond the collective agreement. He also argues that the Board can interpret article 3101(a) in a manner consistent with the Act. The arbitrator, on the other hand, would be restrained by the limitation which article 704 of the collective agreement places on his or her jurisdiction: "The Arbitrator shall not be authorized to render any decision consistent with the terms of this Agreement, nor shall he alter, add to, or amend any of its provisions".

4. As appears from the written material before us, and confirmed by union counsel's submissions at the hearing, the union's complaint, when stripped to its essence, is that it believes the company is obliged to make apprenticeship arrangements through the Joint Committee, composed of two company and two union representatives, and that it did not do so in this case, resulting in better treatment for Mr. Steinke than for the other three new apprentices. We could not determine whether such conduct contravened the Act unless we determined the meaning of article 3101(a). Clearly this is a matter within the jurisdiction of an arbitrator. There is no dispute that the arbitrator has jurisdiction and, indeed, the arguments of the parties really centre on which is the more appropriate forum: the arbitrator or the Board. The Board has held that "it is generally appropriate for the Board to defer to arbitration where a complaint alleging a violation of the Act primarily relates to a contractual difference between the parties": *Nelson Quarry Operation of Genstar Stone Products Inc.*, [1983] OLRB Rep. Sept. 1531; also see *Kodak Canada Ltd.*, [1977] OLRB Rep. Feb. 49. Accordingly, the Board has assumed jurisdiction only in cases where the issue is not essentially a contractual dispute. In our view, despite the gloss which counsel for the union has attempted to put on this dispute between it and the company, we are satisfied that it is most appropriately characterized as one relating primarily (if not totally) to a contractual difference between the parties. The allegations in the complaint are not that the company engaged in one-to-one bargaining with Mr. Steinke but that the company did not follow the proper procedure in determining the rate of pay Mr. Steinke and the other apprentices would receive. We are satisfied that arbitration can "effectively resolve both the unfair labour practice alleged and the violation of the collective agreement" and that arbitration is not only available but also eminently suited to resolving the issue: *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. July 418.

5. Accordingly, after hearing the parties' submissions, we recessed and then reconvened to deliver the following oral decision:

We are of the unanimous opinion that this is a matter in which the Board should defer to the arbitration process and we do so. The essence of the complaint is the meaning of clause 3101(a) of the collective agreement and the scope of duties of the Joint Apprenticeship and Training Committee, that is, a matter squarely within the jurisdiction of the arbitrator.

In *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254, the Board points out that the Board will take jurisdiction "where key provisions of *The Labour Relations Act* require important elaboration and application or where the employer's or trade union's conduct represents a total repudiation of the collective bargaining process": on the former, see *Kodak Canada Ltd.*, *supra*, in which the Board held that the matters in issue had implications extending beyond the collective bargaining relationship of the parties and involved significant issues of interpreting the Act; see *New Gregory House*, [1977] OLRB Rep. Sept. 584, *Nelson Quarry*, *supra*, and *Selinger Wood Ltd.*, [1979] OLRB Rep. June 574 for examples of cases in which the allegations, if proved, would constitute a repudiation of the collective bargaining relationship or "go to the very heart of the collective bargaining structure set out in the Act" (*New Gregory House*, *supra*). The Board will also take jurisdiction where arbitration is unavailable or as in *Valdi Inc.*, *supra*, where "the right of access to the arbitration process is the subject of considerable debate". It will also assume jurisdiction where the arbitral remedy would be inadequate (see *Silknit Limited*, [1980] OLRB Rep. July 1054): in this case, should the arbitrator agree with the union's interpretation of clause 3101(a) of the collective agreement, the arbitrator can grant the substance of the remedies

sought by the union from the Board, and any such decision would have the result of the participation of the union through the Joint Committee in particular apprenticeship arrangements.

None of the circumstances considered in the jurisprudence apply here and therefore we defer to the arbitration process and decline to hear this complaint on its merits.

T-144-86 Canadian Union of Public Employees, Applicant v. Canadian Union of Public Employees Local 16, Respondent

Trusteeship - Board consenting to an extension of applicant's trusteeship over respondent's affairs

BEFORE: *Owen V. Gray, Vice-Chair, and Board Members D. A. MacDonald and E. G. Theobald.*

APPEARANCES: *S. R. Hennessy, Ron Moreau and Gilles LeBel* for the applicant; no one appearing for the respondent.

DECISION OF THE BOARD; April 5, 1988

1. The applicant assumed supervision and control of the affairs of the respondent on December 22, 1986. This is an application under section 82(2) of the *Labour Relations Act* for the Board's consent to an extension of that supervision and control for the one year period beginning December 22, 1987.

2. The functioning of the respondent local was seriously impaired by internal frictions from a number of causes. As a result, a substantial portion of its membership in fact sought the imposition by the parent union of supervision in December 1986. There is no question before us of the propriety of imposition of supervision under the applicant's constitution by the parent union.

3. The applicant's administrator has taken a number of steps to address the very serious problems which led to the membership's request for supervision. While he is hopeful that these will ultimately restore the local's ability to function both democratically and responsibly, a further period of supervision is necessary in order to bring those steps to a conclusion and assess their results.

4. We are satisfied that the respondent local could not be expected to function if the supervision were brought to a premature end by a refusal of consent under sub-section 82(2). We have considered whether our consent should be for a period of less than one year. Having regard to the evidence before us and the total absence of opposition to this application by any member of the local, we are satisfied that the question whether supervision should be brought to an end before the end of the one year period should be left to be determined by the parties under the relevant provisions of their national constitution.

5. Accordingly, the application is hereby granted.

0162-87-U Madeleine Cloutier, Complainant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada), Local 195, Respondent v. Peerless-Cascade Plastics Limited, Intervener

Duty of Fair Representation - Settlement - Unfair Labour Practice - Complaint settled but terms not reduced to writing - Term of settlement that complainant would withdraw complaint - Inquiring into the merits of the complaint might have a deleterious effect on the Board's settlement process - Complaint dismissed

BEFORE: Judith McCormack, Vice-Chair.

APPEARANCES: *Madeleine Cloutier and Charles Cloutier* for the complainant; *Daniel Harris, Patricia Taylor and Bruce Boyd* for the respondent; *Paul Nesseth* for the intervener.

DECISION OF THE BOARD; April 12, 1988

1. This is a complaint under section 89 of the *Labour Relations Act* in which it is alleged that the respondent has breached section 68 of that Act by acting in a manner that was arbitrary, discriminatory or in bad faith in representing the complainant.

2. At the commencement of the hearing, the complainant was able to particularize her allegations against the respondent in the following manner:

1. In March of 1987, the complainant developed tendonitis and was unable to work at her regular position. The intervener assigned her to work in a holding area in the plant for a period of two weeks. The complainant told Pat Taylor, the respondent's plant chairman that she wished to be moved from the holding area because it was too cold as a result of the shipping and receiving doors which were open constantly. Pat Taylor spoke to the complainant's shift supervisor, Lanny Elliott, and later told the complainant that she was to treat the holding area as if it was her machine [that is, her work assignment]. She also told the complainant when her breaks would be scheduled and that she should not speak to other employees on her breaks.

2. During the two week period the complainant was in the holding area, she developed a rash which she suspected resulted from a solution she was using to wipe down parts. Subsequently, when she was no longer working in that area, her doctor asked her to obtain a sample of the solution. When the complainant and later Ms. Taylor requested such a sample from the intervener, the request was refused. Ms. Taylor then advised the complainant to call the Occupational Health and Safety Branch of the Ministry of Labour and the complainant eventually obtained a sample through this route.

3. The complainant was scheduled to attend a hearing in February of 1985 into a claim she had filed with the Workers' Compensation Board. At that time, Ms. Taylor declined to represent her at this hearing.

4. The complainant filed a complaint under the Occupational Health and Safety Act on March 13, 1986. Hearings were held by the Labour Board into this complaint on June 26, 1986 and February 19, 1987. In the complaint, both Mr. Elliott and Ms. Taylor were originally named as respondents. At

the outset, the complainant was asked to choose between proceeding against the respondent and the intervener at that point. After a private discussion with John Moynihan, an international representative working with the respondent, the complainant decided to withdraw her allegations against the respondent. The respondent did not present her case at that hearing. The complainant was unsuccessful in her occupational health and safety complaint.

5. The complainant alleges that she is being harassed by both the intervener and the respondent to the point where she is under such stress that she is now under psychiatric care. As an example, she cites an anonymous note written on the back of her time card in March of 1986 which was derogatory to her.

6. The complainant further complains that she had a difficult time getting her tools sharpened in 1986. She was unable to obtain sharp cutters until Mr. Moynihan attended a grievance meeting on her behalf and obtained a pair for her from the intervener.

In terms of remedy, the complainant requested that the respondent represent her properly in the future and that any harassment of her cease.

3. The respondent in this matter made a number of preliminary objections on the basis of which counsel urged the Board to dismiss the complaint without a hearing. The respondent argued that the Board should decline to inquire into the merits of the complaint for the following reasons:

1. A number of the incidents described date back several years and the complaint is untimely with respect to them. In addition to the usual prejudice resulting from delay, the respondent is at a special disadvantage as the result of the death of Mr. Moynihan.

2. None of the allegations make out a *prima facie* case of a violation of section 68.

3. The allegations with respect to the respondent's failure to represent her at a Worker's Compensation Board hearing were the subject of an earlier complaint filed in April of 1985, which the complainant withdrew. (The complainant advised the Board that she had withdrawn her complaint at that time because she was under too much pressure).

4. A settlement was reached in the instant complaint before the Board with the assistance of a Labour Relations Officer on May 12, 1986 and the respondent has carried out its obligations under that settlement.

4. Evidence was led by both the complainant and the respondent with respect to this last objection, subject to the limitations imposed by section 111(6) of the *Labour Relations Act*. On May 12th, a Labour Relations Officer appointed by the Board convened a meeting attended by Ms. Taylor, Gary Chapman, the respondent's first vice-president, Sue Court, a committeeperson for the respondent, and the complainant. At that meeting, the complainant described her concerns with respect to what she believed was the respondent's failure to represent her properly. She then raised the subject of the derogatory note on her time card and her suspicions that one or more union officials had written it. Those present at the meeting also discussed the problems raised by

the complainant with respect to the holding area. In connection with the derogatory note on her time card, another incident was described in which an anonymous note, also derogatory to the complainant, had been posted on the bulletin board. This note was removed by Ms. Taylor when it was brought to her attention. The complainant was asked several times what she felt would adequately respond to her concerns or what remedies she requested, a question she found difficult to answer. A number of suggestions were then made, and Mr. Chapman described the structure of the local executive of the respondent to the complainant, explained how she could get help in the future and offered to make himself available in this regard.

5. Eventually, the respondent agreed to post a notice condemning the notes on the complainant's time card and on the bulletin board, and to write a letter to the complainant outlining how to obtain assistance from the respondent in the future. Shortly before the end of the meeting, the complainant stated that she was dropping her complaint and left the meeting. No written agreement was executed by the parties.

6. The Board in this matter heard evidence and argument with respect to all the respondent's preliminary objections, and then ruled orally as follows:

1. One of the distinguishing features of labour relations is that it operates in the context of continuing relationships. For that reason, among others, settlements are particularly desirable and the Board has accorded considerable priority to efforts towards this end. It is also essential that the Board's jurisprudence provide a legal climate which encourages and reinforces this goal. If parties to labour litigation cannot rely on their agreements, the Board's settlement processes may be rendered almost worthless. With respect to section 89 complaints, the Board has noted in the past that it has a discretion with respect to its inquiry. It has also declined to proceed further with a complaint in the exercise of that discretion where the parties have reached a settlement. (See, for example, *C. E. Jamieson & Co. (Dominion) Limited* [1985] OLRB Rep. March 375).

2. In this case, I conclude that an agreement was reached on May 12th, 1987 in which the respondent would post a notice condemning the time card note and the derogatory notice posted earlier, and write the complainant a letter describing her avenues of assistance within the respondent. As a result, the complainant announced that she was withdrawing her complaint. Although the agreement was not as formal as it might have been, having heard the evidence of Ms. Taylor, Ms. Court, Mr. Chapman and the complainant, I conclude that it was sufficiently crystallized to be considered a settlement. Although the terms of that settlement were not in writing, they were clear, reciprocal and ascertainable.

3. The complainant emphasizes that she was upset when she left the meeting. However, I conclude that no attempt was made at the meeting to pressure or unduly influence her. To the contrary, the evidence was that Ms. Taylor, Ms. Court and Mr. Chapman were conscious of the fact that the complainant was under a doctor's care and were trying not to upset her. I conclude that they were relatively successful in this regard until shortly before the end of the meeting. While there is no doubt that the complainant was upset at the time she announced she was dropping her complaint, it was also apparent that she finds these events difficult to address in general, and that the respondent

could not afford to disregard her statements merely because she was upset. To do so would have left the complainant without any voice at all in the proceedings.

4. Looking at it from another point of view, the agreement itself was not unreasonable in its terms given the nature of the complaint, the remedy requested, and the complainant's concerns as she described them. It does not in itself suggest that undue influence or intimidation played a role in its creation.

5. I note as well that the complainant agrees that she saw the notice posted by the respondent in the workplace in accordance with the settlement. That notice contains the following passage:

At a meeting held on May 12th, 1987, at the Ministry of Labour office in Windsor (Ouellette Avenue) in regard to a complaint of failure to represent. This is to inform you that same was brought to a negotiated conclusion of withdrawal by the complainant.

The notice was posted on May 12, 1987 but the complainant did nothing to suggest that the passage was not an accurate description of what had occurred or to impugn the settlement for over three months, and only then upon an inquiry by the Board. It was not a case where the complainant agreed to the settlement in an emotional or vulnerable moment and sought to repudiate it immediately when she had regained her composure. In these circumstances, to ignore the parties' agreement and enter into an inquiry of the merits of the complaint might well have a deleterious effect on the Board's settlement process. This is particularly so with respect to the complainant's allegation regarding her Workers' Compensation Board hearing which she has already withdrawn once before.

6. As a result, and in the circumstances of this case, I am not prepared to allow this complaint to proceed further. It is therefore unnecessary for me to address the respondent's other arguments. This complaint is dismissed.

7. In an interim decision in this matter, another panel of the Board dealing with this case also incorporated the styles of cause of Board File No. 0211-85-U and 3075-85-OH out of "an abundance of caution". It was common ground between the parties at the hearing that Board File No. 0211-85-U was the earlier complaint which had been withdrawn by the complainant and that Board File No. 3075-85-OH was the occupational health and safety complaint described earlier which culminated in a final decision of the Board.

**2777-87-G United Brotherhood of Carpenters and Joiners of America, Local 27,
Applicant v. Ellis Don Limited, Respondent**

Construction Industry - Construction Industry Grievance - Grievor not warned before being discharged for incompetence - Whether progressive discipline appropriate in construction industry - Warning must be given if deficiencies are capable of correction - Reinstatement and compensation ordered

BEFORE: *Michael Bendel*, Vice-Chair, and Board Members *W. N. Fraser* and *B. L. Armstrong*.

APPEARANCES: *Leanne Chahley*, *Jim Smith* and *Eric Williams* for the applicant; *Bruce Binning* and *Len Finegold* for the respondent.

DECISION OF MICHAEL BENDEL, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG; April 14, 1988

1. This is a referral of a grievance to the Board under section 124 of the *Labour Relations Act*.

2. The grievance relates to the respondent's termination of the employment of Mr. Eric Williams ("the grievor"). The respondent says that the grievor was incompetent and unable to follow orders. The union denies these charges. It also takes the position that the respondent should have warned the grievor or imposed some other form of discipline before terminating his employment.

3. The grievor, a carpenter, was employed at the Dome Stadium project in Toronto from about July 20, 1987, until his termination on October 30, 1987. A carpenter for about 42 years, he had worked in Jamaica, England, Alberta and Ontario. Much of his work in recent years had been on large projects such as oil refineries, power plants and fertilizer plants.

4. The Dome Stadium project is a large one, employing (as of the date of hearing) more than 600 employees, of whom about 200 were carpenters. The carpenters were organized into pairs, and from six to nine pairs were assigned to a crew or gang, each with its own non-working foreman. Most of the carpenters' work was the building of forms for the pouring of concrete.

5. Between the time the grievor started work and the latter part of September, his foreman was a Mr. Walter. At the time of the hearing, Mr. Walter was believed to be in western Canada, and he was therefore not called to testify. The grievor stated that his relationship with Mr. Walter had been very good, and that Mr. Walter had not only had special confidence in him but had also suggested to him that he leave Toronto and follow him out west. The grievor was aware of no complaints that Mr. Walter might have had about his work or about his relations with other employees. It was, however, the testimony of Mr. Len MacLeod, the respondent's construction manager at the project, that Mr. Walter had complained to him about the grievor and had wanted to fire him after he had been working under his supervision for only a couple of weeks. The complaints, according to Mr. MacLeod, related to the grievor's poor workmanship, his lack of co-operation with his partner and his inability or unwillingness to take direction. Since there was a shortage of carpenters at the time, Mr. MacLeod was against terminating the grievor's employment. Evidence about Mr. Walter's opinion of the grievor was also given by Mr. Peter Muhjala, Mr. Walter's replacement as foreman of the grievor's crew, who testified that Mr. Walter had told him that the grievor had difficulty working with partners, and by Mr. Robert Friolet, the general foreman on the project, who testified that Mr. Walter had complained to him about the grievor.

6. Towards the end of September, Mr. Walter left for western Canada. He was replaced as foreman by Mr. Muhjala, who came onto the job a few days before Mr. Walter left. It seems that the grievor's relationship with Mr. Muhjala, a fellow member of the applicant union, was strained from the very beginning. There was an incident that occurred before Mr. Walter had even left the project involving the building by the grievor of a panel for the purpose of enclosing a concrete beam. Mr. Muhjala testified that he had instructed the grievor to make loose forming, which would have been a 15-minute job, rather than a panel, which would have taken about an hour. When Mr. Muhjala saw that the grievor was building a panel, he questioned him as to why he was not loose forming. The panel the grievor built would not even fit where it was supposed to go. Words were exchanged, which ended with the grievor destroying the panel on which he had been working. As a result, a simple job that should have taken 15 minutes ended up taking about three hours to complete. The grievor's version of the incident was that Mr. Walter, who was still on the job at the time, had specifically instructed him to make a panel. The bad fit was a simple error on his part.

7. Mr. Muhjala testified that he had several other complaints about the grievor's work and behaviour. The grievor, he said, shouted and swore at others to a degree that was excessive even by the standards of a construction site. He always wanted to do the job his own way, rather than the foreman's way or his partner's way. Mr. Muhjala was constantly having to switch the grievor to a new partner since the grievor was unable to co-operate with his fellow carpenters. He did not co-operate well with the carpenters' helpers either, tending to order them around in rough language. He also experienced difficulty using metric measurements. However, according to Mr. Muhjala, the grievor completed his assigned work satisfactorily most of the time.

8. The respondent's dissatisfaction with the grievor's work came to a head with problems in his work while he was on loan to another crew on the project. The other crew, under its foreman, Mr. Errol Didrichsons, also a member of the applicant union, was working on the base of an elevator shaft. More carpenters were needed in this area during the week of October 26 and the grievor was one of those loaned. The grievor was assigned certain forming work by Mr. Didrichsons. According to Mr. Didrichsons and Mr. George Bieberstein, another carpenter who was working in the same area and who was called to testify by counsel for the employer, the grievor, instead of "free forming", as he had been instructed to do, made some panels. One was half an inch too large, and would not fit properly. The error was discovered before installation, and the grievor had to shorten it. While the corrected panel was being installed, the grievor was working on another panel, which should have been of the same dimensions as the first. The grievor, however, made the same half-inch error on the second panel. This was not discovered until after the grievor had returned to his original crew. Mr. Didrichsons' crew was angry at having to waste about two hours of their time correcting the grievor's error. Mr. Didrichsons testified that he felt the grievor's qualifications as a carpenter were below standard. Mr. Bieberstein, a carpenter with some 22 years of experience, testified that, in his opinion, the grievor was not a competent carpenter. The grievor asserted, in his testimony, that he had complied with the specifications given to him by Mr. Didrichsons.

9. Mr. Didrichsons reported to Mr. Muhjala about the grievor's work for him on Friday, October 30, the day the grievor returned to his original crew. The same day, the grievor's partner, Mr. Manuel Fojo, told Mr. Muhjala that he could no longer work with the grievor. He said he was looking for work elsewhere. This was not the first time Mr. Fojo had complained to Mr. Muhjala about difficulties in working with the grievor. His complaints related to the grievor's work, to his giving of orders and to his shouting and swearing. According to Mr. Muhjala, Mr. Fojo was a very good carpenter. Mr. Muhjala went to see the general foreman, Mr. Friolet, to discuss his problems with the grievor. Mr. Friolet told Mr. Muhjala to lay him off on the grounds of incompetence and lack of co-operation, which Mr. Muhjala did that same day.

10. In his testimony, the grievor stated that the difficulties he had had with Mr. Fojo resulted from the latter's limited knowledge of English. They had problems communicating with each other.

11. It is common ground that the grievor was not disciplined or warned that he was jeopardizing his job before October 30, 1987. There was, however, evidence that Mr. Muhjala had spoken to him on several occasions about what he perceived as problems. Mr. Friolet also testified that he had once spoken to the grievor about wasting time on the job. According to Mr. MacLeod, suspensions of employees are rare in the construction industry. Formal warnings, he stated, might be given in the case of safety violations. Poor workmanship is not tolerated since employees referred by the union are supposed to know their trade. Errors are normally brought to an employee's attention, possibly with a warning of firing if they are repeated. To the same effect was the evidence of Messrs. Friolet and Muhjala, who testified that termination of employment is the usual form that disciplinary action takes on a construction site. Mr. Muhjala added that he had not always confronted the grievor with criticisms of his work since it was usually a waste of time to get into arguments on the site.

12. According to the evidence, the Dome project had been short of carpenters from the very beginning and was still short of them at the time of the hearing. The respondent had placed a standing order with the applicant for the referral of more carpenters to the job. The evidence also indicated that other projects in the Toronto area were also experiencing shortages of carpenters.

13. The relevant provisions of the collective agreement are the following:

ARTICLE 5 - UNION SECURITY

5.01 (a) The employer agrees to hire and continue to employ employees covered by this Agreement who are members in good standing of the United Brotherhood of Carpenters and Joiners of America as long as the Local Union or the District Council of the United Brotherhood of Carpenters and Joiners of America in the Province of Ontario can supply qualified employees in sufficient numbers who are capable of performing work required.

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ARTICLE 24 - MANAGEMENT RIGHTS

24.01 The Union agrees and acknowledges that the Employer has exclusive rights to manage the business and to exercise such rights without restriction, save and except such prerogatives of management as may be modified by the terms and conditions of this Agreement. Without restricting the generality of the foregoing it is the exclusive function of the Employer:

(a) to transfer, hire, direct, promote, demote, lay-off, discipline and discharge for just cause employees and to increase or decrease the working forces in accordance with the terms of this Agreement;

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PARTIES' SUBMISSIONS

14. Mr. Binning, counsel for the employer, argued that the employer had terminated the grievor's employment, in accordance with clause 24.01 (a) of the collective agreement, on the ground of his inability to perform the available work. A secondary reason for the termination was that he had been unable to follow orders, which led to problems with his foreman and other employees. The evidence fully substantiated these charges. If the grievor had been able to perform the work, he would have been retained in view of the shortage of carpenters.

15. Mr. Binning acknowledged that the grievor had been given no warning or discipline before his termination. However, he maintained that the case-law had recognized that, in the construction industry, the employer was not required to impose discipline progressively where an employee was unable to do the work. The reason for this difference between the construction industry and other sectors was that there was no probationary employment in the construction industry and the union in the construction industry was supposed to refer qualified employees who were capable of performing the available work (as specified in clause 5.01 (a) of the agreement). Where an employee was incompetent, no amount of discipline would correct this failing and the employer was under no obligation to retain him while giving him warnings or suspensions. He referred to *Re Harold R. Stark Ltd. and United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry* (1972), 1 L.A.C. (2d) 405 (Egan) and *Comstock International Ltd.*, [1987] OLRB Rep. May 667.

16. Counsel for the respondent noted that three union members, Messrs. Muhjala, Didrichsons and Bieberstein, had all testified that, in their opinion, the grievor was not a competent carpenter. Their evidence established his incompetence. They would have had no reason for not telling the truth, and their evidence should be preferred to that of the grievor. His termination for incompetence was inevitable, since discipline could not have made him a competent carpenter. If the respondent kept him on strength from July to October, it was only because there was a severe shortage of carpenters. For this same reason, it was not a hardship for the grievor to have been terminated since he should have been able to find another job very quickly.

17. Counsel for the applicant maintained that, even if the evidence of the respondent's witnesses were preferred to the grievor's, all that it revealed was that the grievor had made some mistakes, that he had had difficulty getting along with others and that he shouted and swore more than most. If the grievor had known that management viewed these weaknesses with concern, he could have corrected them. The evidence demonstrated, however, that he had received no discipline and no formal warning that he was endangering his employment prior to October 30. According to counsel, the case-law established the proposition that, even in the construction industry, employees are entitled to a warning or some minor form of discipline before their employment is terminated. In addition to the cases cited by Mr. Binning, Ms. Chahley referred to *Proweld Company Limited*, [1982] OLRB Rep. March 437 and *Canadian Engineering and Contracting Co. Ltd.*, [1983] OLRB Rep. July 1017. She also noted that clause 24.01 (a) specifically envisaged that the employer might take some form of disciplinary action short of discharge.

18. In the alternative, Ms. Chahley argued that we should accept the grievor's evidence that he was a competent carpenter and that he had carried out his assignments in a proper manner. Much of the evidence presented on behalf of the respondent was hearsay or opinion evidence. There was no reason to resolve the inconsistencies in the evidence by making findings adverse to the grievor's credibility.

REASONS FOR DECISION

19. Upon a consideration of the evidence as a whole, we have concluded that we should prefer the evidence of the witnesses called by counsel for the respondent to the grievor's. Two of these witnesses, Messrs. Muhjala and Bieberstein, had had an opportunity to observe the grievor's work. While some of the other evidence was hearsay and some was opinion evidence, a consistent picture emerged. Against this was the entirely uncorroborated testimony of the grievor. In weighing the evidence, we would also note that three of the witnesses called by counsel for the respondent were union members. No suggestion was made by or on behalf of the grievor as to why the

witnesses called on behalf of the respondent would have been motivated to conspire against him in developing their consistent testimony.

20. The real question that we have to consider relates to the absence of warnings or minor discipline before the grievor's employment was terminated. If the grievor had been employed in a sector other than the construction industry, termination of employment in similar circumstances would not have been justified (in the absence of special language in the collective agreement) since there is generally a requirement for employers to bring home to employees the seriousness with which their failings are viewed before firing them. In the construction industry, however, it is said that different considerations apply because of the special nature of employment relationships. In particular, it is said that, in cases of incompetence in the construction industry, the employer can terminate employment without any warning, since no amount of warning would remedy the situation in any event.

21. We have examined carefully the case-law cited to us by counsel for the respondent and counsel for the applicant. A theme running through those cases is that, absent exceptional circumstances or special language in the collective agreement, deficiencies in conduct or performance that are capable of being corrected cannot be the basis for termination of employment, even in the construction industry, unless preceded by at least a warning that the employee is putting his employment in danger by the deficiencies in question. We did not understand counsel for the respondent to be in disagreement with this view of the case-law. What we must therefore consider is whether the evidence would support a finding that the grievor's failings were of such a nature that he could not have corrected them had he known how seriously they were regarded by the respondent.

22. The record reveals errors that the grievor made, particularly in his measurements, which may have resulted, in whole or in part, from his difficulty with metric measurements. It also reveals that he failed to follow instructions as to the type of form he was supposed to construct. But the evidence does not exclude the possibility that he made these errors as a result of carelessness, misunderstanding or a poor attitude, rather than incompetence. In our opinion, it does not disclose that the grievor lacked the essential qualities of a competent carpenter. Mr. Muhjala specifically testified that most of the assignments given to the grievor were satisfactorily completed. We are therefore not persuaded that a warning or even a suspension would have been futile in terms of correcting his performance. A curt warning that a repetition of such errors would lead to termination of his employment might have jolted him sufficiently for there to have been an improvement in these areas.

23. In addition, the evidence shows that a significant element in the decision to fire him was his inability to work co-operatively with other carpenters and with carpenters' helpers. Mr. Muhjala, in his testimony, also indicated his strong disapproval of the grievor's shouting and swearing. Had the grievor been warned about his conduct in these areas, he might have been able to improve it to the point that it was acceptable.

24. In short, we are not satisfied that this is strictly a case of incompetence, where attempts by the employer to correct unacceptable performance would have been doomed to failure from the beginning. We are not condoning marginal or substandard performance. The respondent was undoubtedly free to insist on high standards of work from its carpenters. However, in our view, it was not at liberty to terminate the grievor's employment on October 30, 1987, as it had not previously apprised him of the danger he was courting, in terms of the termination of his employment, by the performance or conduct in question.

25. The grievor is therefore entitled to a remedy for the discharge without just cause that he suffered. We order that he be re-instated in employment with full compensation for lost pay and

benefits. We will remain seized of this matter in the event that the parties are unable to agree on the amount of compensation due to the grievor.

DECISION OF BOARD MEMBER W. N. FRASER;

1. I disagree with the majority in finding in favour of the grievor, and in ordering that he be reinstated in employment with full compensation for lost pay and benefits.
2. The evidence presented by three fellow members of the union as to the incompetence of the grievor is unusual and is sufficient to persuade me that the dismissal was more than justified, given the normal procedures in construction employment.
3. The decision of the majority acknowledges that mistakes were made by the grievor on more than one occasion, and that his attitude and inability to follow directions were evident. For these reasons I cannot agree with their decision.
4. In my opinion an order to reinstate the grievor would not serve in the best interests of either the grievor or the respondent. Compensation for lost pay and benefits seems to be a particularly onerous penalty in light of the current plentiful employment opportunities for the carpenter trade in Toronto.
5. I believe that the decision of the majority will not resolve the acknowledged difficulties of the grievor in his skill deficiencies, nor encourage him to improve his attitude.

0649-87-R; 0650-87-R; 2826-87-U Southern Ontario Newspaper Guild, Local 87 the Newspaper Guild, Applicant v. **The Globe and Mail** Division of Canada Newspapers Ltd., Midco Trucking Service and Robert J. Lucier, Jr. carrying on business as Lucier Express, Respondents; Southern Ontario Newspaper Guild, Local 87 the Newspaper Guild, Applicant v. The Globe and Mail Division of Canada Newspapers Ltd., Midco Trucking Service, Robert J. Lucier, Jr. carrying on business as Lucier Express, Respondents; Southern Ontario Newspaper Guild, Local 87 the Newspaper Guild, Complainant v. The Globe and Mail Division of Canada Newspapers Ltd., Respondent

Interference in Trade Unions - Related Employer - Sale of a Business - Unfair Labour Practice - Drivers laid off when employer contracted out its trucking operations - Negotiations with laid off employees concerning the possibility of awarding some contracts to them - Employer refusing to sign contracts when it learned from union they might still be employees - Meetings with employees not breach of Act - Board not determining if refusal to award contracts breach of Act because not appropriate to grant remedy anyway - No sale of business or related employer - Complaints dismissed

BEFORE: Rosalie S. Abella, Chair, and Board Members D. G. Wozniak and B. L. Armstrong.

APPEARANCES: Steven M. Barrett, Howard Law, Margaret Leighton and Paul Pelletier for the applicant/complainant; D. K. Gray and D. Barsoski for The Globe and Mail Division of Canada

Newspapers Ltd.; *Barry W. Earle, Eric M. Roher, Robert Lucier and David Newland* for Midco Trucking Service and Robert J. Lucier, Jr., carrying on business as Lucier Express.

DECISION OF THE BOARD; April 11, 1988

1. On September 26, 1986, the Globe implemented a decision made in August to divest itself of its trucking operations. This resulted in lay-off notices to about a dozen drivers, and the contracting out of their work to Lucier and Midco. The union grieved the lay-offs under the collective agreement, and eventually brought applications before the Board pursuant to sections 50, 64, 66, 67, 72, 75, 76, 80 63, 1(4) and 106(2) of the *Labour Relations Act* in connection with the Globe's actions, and sections 63 and 1(4) in connection with Midco and Lucier.

2. The Globe has always used a combination of methods to effect delivery of its newspapers across Canada. Throughout Canada, independent agents and common carriers were used on a contract basis. For seven runs in Ontario outside Toronto, prior to September 26th, the Globe used its own employees and trucks. It is the laying off of these employees which forms the substance of the complaint before the Board. There is nothing in the collective agreement expressly prohibiting contracting out.

3. The Globe started its cost-cutting programme four years ago. Many lay-offs resulted, including several in the advertising and sales staff in May 1986, and in the loading dock area in March 1986. The automation of the loading dock, resulting in 23 of 31 employees being laid-off, was what prompted an examination of the trucking operations.

4. In August 1986, the Globe received a report it had commissioned from Touche-Ross outlining the financial benefits of eliminating its trucking operations. The Globe had eleven trucks, and based on this report, decided in early September to sell them to save the cost of operating a garage with mechanics, drivers and garage attendants. The trucks sat idle for at least two thirds of the day, and the loading dock area was about to be automated. The Globe concluded that they could more economically and efficiently effect the delivery process by giving to independent third parties responsibility for the six or seven Ontario highway runs currently done nightly by its own employees.

5. On September 26th, in a letter to the local representative, Paul Pelletier, the Globe informed the Guild and the employees of its intentions. Pursuant to the collective agreement, meetings were arranged to discuss the plan, the first one taking place with six representatives from the Guild on September 26th. The parties discussed the changes in the loading dock area, changes in highway delivery overtime, and the Globe's intention to get out of the trucking operations. The Guild asked for and subsequently received the financial information upon which the Globe had based its decision. According to the Globe's figures, there would be an estimated saving of \$361,000.

6. The next meeting between the Guild and the Globe took place on October 9th, 1986. The parties met all afternoon, and discussed, among other things, whether any of the current employees in the bargaining unit could or should take over the work as independent contractors. The Guild asked whether these employees would be permitted to bid on the trucks. In its letter dated September 26th, the Globe had indicated an unwillingness to use former employees.

The relevant paragraph of the letter reads:

"The Globe has investigated the possibility of selling trucks to present employees, but financial analysis indicated that this would not generate a reasonable return on the employees' capital

invested. However, the company is willing to discuss such an arrangement with any employee interested in pursuing it."

No one from the Guild objected to this possibility either at this meeting or at the subsequent ones on October 15th and 17th. In fact, it was only at the request of the Guild that this methodology was pursued by the Globe. At the October 15th meeting, the Guild proposed that three to four runs and one garage mechanic be retained, and that the rest of the runs be contracted out. The Globe rejected this as inefficient, since it would save the Globe only \$200,000 annually.

7. Lay-off notices were sent to the drivers on October 17th. The union grieved these lay-offs. On October 21st, a memo was sent to the laid-off employees by the Globe advising them that they could apply for the delivery runs and purchase the trucks. No one from the union objected to this memo.

8. Four of the employees applied for the runs. The Globe had discussions with each of these employees with the full knowledge but in the absence of the Guild, to discuss their bids and the terms of their contracts. Terms were eventually agreed upon with all four employees and a meeting was arranged with them for the evening of November 24th to sign the contracts. At no time during these negotiations did the Guild ask to be present during the discussions with employees or express any disapproval of either the process or result of the talks.

9. On the morning of November 24th, counsel for the Globe and the Guild met to discuss all outstanding grievances. During this meeting, counsel for the Guild raised the possibility that if contracts were awarded to the four former employees, the Guild might take the position that they continued to be Globe employees covered by the collective agreement. The Globe was surprised by the Guild's position, being under the impression that the Guild encouraged and approved of the drivers having access to the contracts. The Globe met later that afternoon with representatives of the Guild and informed them that unless they could be assured that the Guild would not bring proceedings to have the four men declared employees, the contracts would not be awarded to them. The Guild replied that it would undertake not to bring an application before the Ontario Labour Relations Board, but reserved to itself the right to bring a grievance under the collective agreement. The Globe informed the four employees that night of the Guild's position and explained that under the circumstances it would not sign contracts with them. The signing of the contracts was put on hold, but by December 12th, the Globe had notified the drivers by phone that the contracts would not be signed. The four drivers were then given an additional eight weeks' notice and remuneration by the Globe since they had expected to be made independent contractors imminently and had not sought other employment.

10. The four employees with whom the Globe had negotiated contracts were not told by the Guild before November 24th that there was a potential problem with the signing of their contracts. Only one of the four drivers was called by the Guild as a witness and his evidence was that he only heard from the Guild about the issue *after* November 24th, and then only because he approached the Guild about it. Only one meeting took place between the Guild and the drivers, two or three weeks after the September 26th Globe memo. The purpose of the meeting was to discuss alternatives to the lay-offs. No one from the Guild discouraged or even discussed with them the paragraph in the September 26th memo which raised the possibility of "selling trucks to present employees", or the Globe's willingness to discuss "an arrangement with any employee interested in pursuing it". And at no time did the Guild inform the drivers that it would take the position that they would still be considered employees if they were awarded the runs.

11. The Guild admitted that as part of a potential settlement, it would accept contracting out of the least cost-efficient runs for the Globe. It knew from their questions in October and early

November that some of the drivers were interested in bidding on the runs, and at least one driver asked the Guild what it would do if they got the runs. According to Paul Pelletier, a lawyer and the local representative for the Guild, the Guild did not have a lot to say about it, but explained to the employees that the Globe was open to their bids and to selling them the trucks, but was not sure it was financially worth their while. In mid-November, the Guild was told by the Globe that four drivers, whom they named, had made successful bids and would be given the runs. On January 28, 1987, the Guild grieved the Company's termination of the four drivers "and the manner in which they were dealt with by the Company from the time of the issuance of the notice of intent to effect economy dismissals dated September 26, 1986 until they were finally terminated on December 12". Both the lay-off and termination grievances remain outstanding.

12. Both Lucier and Midco were pre-existing businesses and had for years been independent agents delivering papers for the Globe. In December, after concluding that they would not award the contracts to the four former employees, the Globe decided to use Lucier and Midco for the remaining Ontario runs. No written agreement exists between the Globe and Midco. The Globe's evidence was that it does not know or care how many trucks, or what kind, Midco or Lucier use, how many drivers they have or what they are paid, what routes they use, or what other business Midco or Lucier does with or for other companies. Midco purchased no trucks from the Globe. Lucier purchased two, both at their appraised value. No financing was extended. The sold trucks were painted, and bear the name "Lucier Express". None bears the Globe's logo. The only instructions given by the Globe to Midco and Lucier were that they were required to drop off specific numbers of papers as quickly as possible at designated locations. All but one of the six arrangements negotiated with Lucier and Midco are for the same amount as were negotiated with the four former employees. Both Lucier and Midco understand that the Globe could terminate or alter the arrangement at any time.

13. The Guild does not dispute that there was a major cost-saving to the Globe, and that this was the primary reason for the laying-off of the drivers. The key decision, according to the Guild, was the decision not to give the runs to the four employees. Nor does it deny that it was aware as early as September that one of the possibilities involved selling trucks to employees. It confirms, in fact, that as early as October 19th, when it was told it would not be involved in negotiating these contracts, it knew that the possibility had materialized into a reality. But it denies either encouraging or condoning the arrangement. The Guild denies, in argument, "leading the Globe on in order to pull the plug at the last minute" and argues that their position should not have been a surprise to the Globe. The Guild asserts that it should have been invited to the meetings between the Globe and the drivers and told the financial details of the arrangements. Failure to do so violated the Guild's representation rights pursuant to sections 64 and 67. In addition, the Guild argued that the refusal by the Globe to sign contracts with the four drivers when it learned they might still be employees, was an attempt to avoid having to negotiate with the Guild over the terms of their contracts, contrary to sections 64 and 66.

14. The Guild's argument pursuant to sections 72, 75, and 76 of the Act is that by making the signing of the contracts with the four drivers conditional on the Guild refraining from exercising rights they might have under the *Labour Relations Act* or the collective agreement, the Globe was engaged in a lockout. Although the decision to contract out was undeniably irrevocable, the decision not to hire the four drivers was revocable. Since both the right to grieve and the right to be represented by a trade union were being interfered with by the Globe, and since the Globe was trying to change the terms and conditions of employment, there is both a lock-out and an unfair labour practice.

15. The union's section 80 argument is that in refusing to continue to employ the four driv-

ers when it learned that the Guild might take legal action, the Globe was exercising reprisals based on the drivers' participation in a proceeding under the Act.

16. Because the contracts with Lucier and Midco are so similar to the ones negotiated with the drivers, and because a substantial portion of their business now comes from the Globe, the union argues that the operations are unlike those of a common carrier and are more clearly integrated. Moreover, the process used by Lucier and Midco's drivers in picking up papers from the Globe's loading dock is substantially similar to the one formerly used by the Globe's ex-employees. The Guild argues that what has been transferred to Lucier and Midco is the delivery part of the Globe's business, and section 63 refers to "business or part of a business".

17. Pursuant to section 106, the union alleges that the Globe continues to be the employer, and that Lucier and Midco are dependent contractors because the work is being performed for the benefit of the Globe as an integral part of the Globe's business. Even if we reject the union's section 106 argument, it urges the Board to exercise its discretion pursuant to section 1(4) in favour of the maintenance of bargaining rights on the grounds that the activities are under common control and direction, a joint venture exists, and the same kind of work is being performed.

18. In its concluding argument, the union seeks a declaration from the Board that there has been "a massive repudiation" of the agreement, contrary to section 50 of the Act.

19. The relevant portions of section 63 of the *Labour Relations Act* states:

63. (1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto

Section 1(4) of the *Act* states:

(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

20. As the Board has frequently acknowledged, the delineation of what constitutes a 'business' or 'part of a business' is often problematic. The purpose of section 63 is essentially to preserve bargaining rights where there is continuity, through a commercial disposition, of all or part of a business undertaking. Each situation calls for an examination of the reality of what has been transferred to ensure that the continuity and stability contemplated by section 63 are preserved where appropriate. But the Board has also recognized that there are those commercial arrangements which do not fall within the liberal interpretation the section demands.

21. Where the arrangement, as in this case, involves the transfer not of the vendor's entire business, but rather of a part of its undertaking, the examination becomes more delicate. We are

left to assess what has been transferred, how it has been disposed of and how it is ultimately implemented. In the circumstances of this case, the Globe had an existing practice of contracting out its delivery service and was extending it to the Ontario highway runs based on what the Guild concedes was a bona fide business decision (*Complete Car Care Centres*, [1983] OLRB Rep. Aug. 1293). What the Globe did was not a sale to Midco and Lucier of a part of its newspaper business, it was transferring a "like function" to pre-existing business entities who had their own management, assets, employees, and customers. It was transferring work it no longer wished to perform, not part of its business. (*The Corporation of the City of Stratford*, [1985] OLRB Rep. June 923). The methods and equipment, other than the designation of delivery times and places were not provided by the Globe. As the Board stated in *Metropolitan Parking Ltd.*, [1979] OLRB Rep. Dec. 1193:

"For a transaction to be considered a 'sale of a business' there must be more than the performance of a like function by another business entity. There must be a transfer from the predecessor of the essential elements of the business as a block or a "going concern". A business is not synonymous with its customers or the work it performs or its employees."

What the Globe made was a commercial arrangement which provided for the delivery of newspapers through independent carriers. (*Complete Car Care Centre*, [1983] OLRB Rep. Aug. 1293; *Superior Sanitation Services Limited*, [1968] OLRB Rep. July 395; *Ontario 474619 Ltd.*, [1981] OLRB Rep. Oct. 1452; and *The Charming Hostess Inc.*, [1982] OLRB Rep. Apr. 536).

22. Nor do we feel that this situation involves related activities or businesses carried on under common control or direction which would warrant the exercise of our discretion pursuant to section 1(4). The Globe exercises no control or direction over the employees of Midco or Lucier, nor are they perceived by the employees to exercise any such control or direction; Midco and Lucier are responsible for setting and paying remuneration to the employees; the Globe has no disciplinary rights or duties over Midco or Lucier's employees; the employees are selected and hired by Midco and Lucier and can be terminated only by them; and Midco and Lucier clearly understood, as did the Globe, that the relationship between them and the Globe was entirely independent. The parties, in short, who exercise "fundamental control over the working lives and working environment" of the employees are Midco and Lucier, not the Globe. (*Kennedy Lodge Incorporated*, [1984] OLRB Rep. July 931). The degree of economic control by the Globe is negligible and there is nothing about the relationship between the Globe and these two business entities that can be characterized as the kind of "joint venture" which might lead the Board to exercise its discretion in favour of granting a declaration (*Kennedy Lodge Inc.* supra; *Don Mills Bindery Inc.*, [1983] OLRB Rep. Dec. 2008; *Brantwood Manor Nursing Homes Limited*, [1986] OLRB Rep. Jan. 9; *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214).

23. The Guild was fully informed about each Globe decision in connection with the dismantling of the trucking operation and there was neither an attempt nor intent to hide anything from the Guild or the employees. At first, it was the Globe's intention not to award any of the contracts to its employees based on its perception that it would be uneconomical for them. It was only when the Guild encouraged the Globe to take bids from existing employees at the September 26th meeting that the Globe did so. The actual bids from four of these employees did not come until significantly after the decision was made to contract out and only after they received their lay-off notices on October 17th. The process of accepting and negotiating these bids was undertaken with the full knowledge and encouragement of the Guild. The Guild never objected to the Globe's process or solicitation of bids from these employees. The Guild's only question to the Globe in this connection was whether it would be involved in the process of negotiating the bids and was told by the Globe that it would not be. The Guild never objected to this exclusion until it launched these proceedings. Only after the November 24th disclosure by the Guild of its new position did the Globe

decide not to use the four employees, and opted instead for a clearer arms-length transaction, reimbursing the four drivers for their expenses in attempting to finance or organize their prospective new businesses and giving them a further eight weeks' notice.

24. We are satisfied on the facts of this case and based on our assessment of the credibility of the witnesses, that the Globe has not violated sections 66, 67 and 70 of the Act. With the full knowledge of the Guild, and only at its request and encouragement, the Globe, having made the irrevocable decision to contract out the work and lay off the drivers, entered into negotiations with four of them for the Ontario highway runs. The Guild knew the basis for these negotiations and took no steps to participate in them having been told by the Globe that they would not be invited to do so. There is no suggestion that these openly undertaken negotiations represented an attempt to frustrate the Guild's bargaining rights or to sever the relationship between these four employees and the Guild. The decision to contract out was strictly an entrepreneurial one based on, as the Guild concedes, legitimate business reasons. These discussions with the four employees flowed from that decision to close down the trucking operations.

25. What is more troubling, however, is the Globe's decision not to hire these four drivers once the Guild disclosed its position that it might assert their continued status as 'employees'. Although the Guild's position may appear facially to be anomalous - that it was unlawful for the Globe to meet with the four drivers without the union, that it was unlawful to come to an agreement with them, but that it was also unlawful for the Globe not to follow through on these unlawful procedures and agreements - it raises some concern. Parties are undeniably free to negotiate the resolution of their disputes by offering alternative courses of action, including the instigation or withdrawal of a complaint (*The Corporation of the City of Ottawa*, [1986] OLRB Rep. Apr. 533). But where, as here, the prospect of litigation resulted in the Globe's refusal to enter into the arrangement described above with the four drivers because, among other reasons, it might have resulted in the continuation of a bargaining relationship with the union, we are not as sanguine that the Globe was simply attempting to avoid the renewed cost of an employment relationship, a cost it had attempted to avoid through its decision to contract out. In refusing to extend contracts to these drivers, it was also interfering with the possibility that the Guild would continue to be their bargaining agent.

26. However, it is unnecessary to resolve conclusively that issue in the circumstances of this case as even if we were to find that it constituted a breach of sections 64, 72 and 80 the Act, we are not satisfied that it would be appropriate to grant a remedy in the circumstances of this case. The same is true of the Guild's submissions with respect to sections 50, 75, 76 and 106 of the Act. The Globe made, and immediately communicated to the Guild, a lawful decision to close down its trucking operations. During the course of negotiations over the implementation of this decision, the union requested that the Globe reverse its decision not to offer any runs to existing employees. In complying with this request, the Globe entered into discussions with four drivers. The Guild knew of these discussions, and at least until the day they were to be formalized, neither advised nor took steps with either the Globe or these employees to indicate that the contracts might be impugned. We make no comment on the tactical approach taken by the union - there is no evidence that the Guild or Pelletier had even considered the possibility of challenging these four drivers as ongoing "employees" until the Guild's lawyer raised it at the November 24th meeting. The Globe, however we might characterize its decision to refuse to sign contracts with these drivers, was left in the position of finding its original decision to close down the trucking operations in jeopardy. It could either sign the contracts and face the prospect of litigation and the ultimate undermining of its declared strategy, or it could refuse to sign and make alternate arrangements for the six Ontario highway runs. It chose the latter, and in so doing, made arrangements we earlier concluded were valid and beyond the scope of the Act. In those circumstances, we do not find it

appropriate to exercise our discretion to grant any remedial relief even if we found the Globe to have contravened the Act.

27. For the foregoing reasons, these applications and complaint are dismissed.

0277-87-G Ontario Council of the International Brotherhood of Painters and Allied Trades, Applicant v. Harbridge & Cross Limited, Respondent v. Toronto Construction Association, Intervener

Construction Industry Grievance - First grievance dismissed following request to withdraw late in proceedings - No cause of action or issue estoppel in regards to this grievance - Whether Painters acquired bargaining rights by means of a working agreement signed between the Toronto Building and Construction Trades Council and the respondent - Respondent held bound to Painters provincial agreement - Breach of sub-contracting clause

BEFORE: *Ken Petryshen, Vice-Chair, and Board Members D. A. MacDonald and J. Kennedy.*

APPEARANCES: *A. M. Minsky, T. Michael and A. Colafranceschi for the applicant; Bruce Binning for the respondent; Bruce Binning and Brian Foote for the intervener.*

DECISION OF THE BOARD; April 14, 1988

1. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*.

2. At the commencement of the hearing, the parties filed with the Board an agreed statement of facts and a number of documents which were entered and marked as exhibits on consent. Neither party called any oral evidence. The agreed statement of facts reads as follows:

OLRB File No. 0277-87-G

BEFORE THE ONTARIO LABOUR RELATIONS BOARD

B E T W E E N :

ONTARIO COUNCIL OF THE INTERNATIONAL BROTHERHOOD OF
PAINTERS AND ALLIED TRADES

Applicant

- and -

HARBRIDGE & CROSS LIMITED

Respondent

AGREED STATEMENT OF FACTS

The parties agree on the following facts for the arbitration hearing in this matter:-

1. The Respondent and The Toronto Building and Construction Trades Council ("the Toronto B.T.C.") duly entered into a Working Agreement on July 10th, 1967 ("the Working Agreement"). A copy of the Working Agreement will be filed as an exhibit at the arbitration hearing.
2. The Toronto B.T.C. is a council of trade unions chartered in 1943 by the Building and Construction Trades Department of the AFL-CIO ("the Department"). On July 1st, 1979, the Department chartered the Toronto-Central Ontario Building and Construction Trades Council ("the Toronto-Central Ontario B.T.C.") and assigned to it the jurisdiction of a number of existing building trades councils, including the Toronto B.T.C. The Toronto Central-Ontario B.T.C. includes amongst its members all the trade unions that formerly belonged to the Toronto B.T.C. and stands in the same relation to the Respondent as did the Toronto B.T.C. prior to July 1st, 1979.
3. At all times material to these proceedings, including on July 10th, 1967, the Painters' District Council 46, which is affiliated with the Applicant Ontario Council of the International Brotherhood of Painters and Allied Trades ("the Ontario Council of Painters"), was an affiliated trade union of the Toronto B.T.C. and since July 1st, 1979, of the Toronto-Central Ontario B.T.C.
4. Painters' District Council 46 is bound by a Provincial Agreement between The Ontario Painting Contractors Association, Acoustical Association Ontario, Interior Systems Contractors Association of Ontario with The International Brotherhood of Painters and Allied Trades and The Ontario Council of Painters effective from June 16th, 1986 until April 30th, 1988 covering, *inter alia*, painting and related work in the Province of Ontario ("the Painters' Provincial Agreement"). A copy of the said Provincial Agreement will be filed as an exhibit at the arbitration hearing.
5. In or about mid-March, 1987, the Respondent sublet painting work covered by the Painters' Provincial Agreement at its projects for Bell Canada at 5253 Hurontario Street, Mississauga and for the Chinese United Church at 3300 Kennedy Road, Scarborough to painting subcontractors who are not bound by the Painters' Provincial Agreement. The work has been performed by such non-union subcontractor at the Bell Canada project but as of this date not at the Church project. As a consequence of such subcontracts, the Applicant delivered a grievance dated April 24th, 1987 to the Respondent which grievance is the subject matter of this Referral. A copy of the said grievance will be filed as an exhibit at the arbitration hearing.
6. On March 16th, 1984, the Respondent gave notice to the Toronto-Central Ontario B.T.C. of its desire to terminate the Working Agreement on July 9th, 1984 to which the said Council responded on March 20th, 1984 but which response was not received by the Respondent. Thereafter, on May 22nd, 1984, the Respondent gave further notice to the said Council of its intention to terminate the Working Agreement on July 9th, 1984 to which the Council responded on May 3rd, 1984. No applications have ever been made by the Respondent or its employees nor has any decision been made by the Board to terminate the bargaining rights of the Toronto B.T.C. or the Toronto-Central Ontario B.T.C. or any of their affiliated trade unions for the Respondent's employees. Copies of said correspondence will be filed as exhibits at the arbitration hearing.
7. The Toronto-Central Ontario B.T.C. referred a grievance dated January 4th, 1985 to arbitration by the Board on January 10th, 1985 (O.L.R.B. File No. 2728-84-M). The grievance dated January 4th, 1985 did not involve the same work, project, subcontractor or Provincial Agreement as the grievance dated April 24th, 1987 which is referred to in para. 5 above. Subsequent to the arbitration hearing but before the Board had rendered any decision, the Council requested the Board's leave, under cover of July 31st, 1985, to withdraw the said Referral. By decision dated August 9th, 1985, the Board without prior notice to the Respondent dismissed the Referral having regard to the stage of the proceedings at which the request was made. By letter dated November 12th, 1985, the Respondent requested reconsideration of the Board's decision which request has never been disposed of by the Board. Copies of the said grievance, Referral, decision and request for reconsideration (with attachment) will be filed as exhibits at the arbitration hearing.
8. At all times material to these proceedings, the only collective agreements existing between any of the affiliated trade unions of the Toronto B.T.C. or the Toronto-Central Ontario B.T.C.

with the Toronto Construction Association have been between the the Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227 and 3223, International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, International Union of Bricklayers and Allied Craftsmen, Local 2, International Union of Operating Engineers, Local 793, Labourers' International Union of North America, Local 506 and Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 598 with the General Contractors' Section of the Toronto Construction Association.

9. Since signing the Working Agreement, the Respondent has only employed employees represented by the six trade unions referred to in para. 8 above.

DATED at Toronto, this 17th day of August, 1987.

ONTARIO COUNCIL OF THE INTERNATIONAL BROTHERHOOD
OF PAINTERS AND ALLIED TRADES

Per: “Illegible”

HARBRIDGE & CROSS LIMITED

Per: “Illegible”

The parties amended paragraph 9 of the agreed statement of facts at the hearing and advised the Board it should read: “At the time the Working Agreement was signed (July 10, 1967) and since that time, the Respondent has only employed employees represented by the six trade unions referred to in paragraph 8 above”.

3. Counsel for the respondent raised two matters which the parties agreed the Board should deal with in a preliminary fashion. After entertaining the parties' submissions with respect to the respondent's preliminary motions, the Board advised the parties that it would reserve its decision. Prior to the next scheduled hearing date, the Board advised the parties in a decision dated September 11, 1987 that it dismissed the respondent's preliminary motions and that its reasons for doing so would follow in due course. Before proceeding to address the merits of the referral, the Board will provide its reasons for dismissing the respondent's preliminary motions.

4. The factual basis for the respondent's motions is contained essentially in paragraph 7 of the agreed statement of facts. Counsel for the respondent also directed our attention to Exhibits Nos. 8, 9, 10 and 11. On January 10, 1985, the Toronto-Central Ontario Building and Construction Trades Council (“Toronto-Central Ontario B.T.C.”) on its own behalf, and on behalf of its affiliates listed in Scheduled “A” attached to the referral, referred a grievance dated January 4, 1985 against Harbridge & Cross Limited to the Board (hereinafter referred to as “the 1985 referral”) pursuant to section 124 of the Act. One of the affiliates listed in Schedule “A” is the International Brotherhood of Painters & Allied Trades District Council 46 (“District Council 46”). As noted in paragraph 3 of the agreed statement of facts, District Council 46 is affiliated with the applicant in the present referral, the Ontario Council of the International Brotherhood of Painters and Allied Trades (“Ontario Council of Painters”). Counsel for the respondent submitted that the first referral in effect was brought on behalf of the Ontario Council of Painters through District Council 46.

5. The material before us discloses that Harbridge and Cross Limited challenged the effect of the Working Agreement dated July 10, 1967 in the first referral. It took the position then that bargaining rights were created by the Working Agreement only for those affiliates of the Toronto-Central Ontario B.T.C. listed in paragraph 8 in the agreed statement of facts. In other words, the Working Agreement did not create bargaining rights for the other affiliates, including District Council 46. The material before us also discloses, and the parties have agreed, that the first referral

did not involve the same work, project, subcontractor or provincial agreement as the present referral. The first referral concerned roofing and electrical work at the Alloid Colloides project in Brampton which Harbridge & Cross sublet to certain subcontractors.

6. After the Board completed the hearing with respect to the first referral, by letter dated July 31, 1985 the Toronto-Central Ontario B.T.C. requested the Board's leave to withdraw the first referral before the Board rendered any decision. Without prior notice to the respondent, the Board dismissed the first referral in a decision dated August 9, 1985 having regard to the stage of the proceedings at which the request was made. In a letter dated November 12, 1985, the respondent made a request under section 106(1) of the Act seeking from the Board "a clarification of its decision". Specifically, the respondent requested that "the Board clarify its dismissal of this application [the first referral] by confirming that the respondent is only bound to Provincial Agreements with the Affiliates with whom the General Contractors Section of the Toronto Construction Association has a bargaining relationship". When the referral before the present panel of the Board came on for hearing, the respondent's request under section 106(1) had not been disposed of by the Board.

7. Before the present panel, counsel for the respondent took the position that the instant referral should be deferred and not heard until the Board disposes of the respondent's request under section 106(1) of the Act in the first referral. Counsel argued that this matter should not proceed until the process concerning the first referral is completed. Secondly, counsel argued that if the Board did not accept the respondent's first position, the Board should dismiss the instant referral on the grounds that matters raised in the referral are *res judicata* by virtue of the Board's decision with respect to the first referral. Counsel noted that the issues in the present referral regarding the effect of the Working Agreement are the same as those in the first referral. Counsel argued that the dismissal by the Board of the first referral in circumstances where it heard the evidence and where the effect of the Working Agreement was argued is sufficient to support its *res judicata* argument. In support of his position, counsel for the respondent relied on the following cases: *Kinna v. Reilander et al.*, [1978] 7 C.P.C. 70 (B.C.S.C.); *Staff Builders International Inc. v. Cohen et al.*; *Cohen et al. v. Staff Builders International Inc. et al.*, [1983] 38 C.P.C. 82 (Ont. H.C.O.); *Losereit Sales and Services Ltd.*, [1983] OLRB Rep. July 1090; and *Montgomery Elevator Co. Limited*, [1985] OLRB Rep. Dec. 1776. Counsel for the applicant requested that the Board not defer nor dismiss the referral.

8. In the circumstances of this case, the Board was satisfied that it should not defer the present referral until the respondent's section 106(1) request is disposed of. As section 106(1) of the Act indicates, the Board's decision dated August 29, 1985 dismissing the first referral is final and conclusive for all purposes. Although section 106(1) gives the Board the power to reconsider decisions and to vary or revoke decisions, the decisions of the Board are final until the Board varies or revokes a decision. Therefore, the Board's decision dated August 29, 1985 represents a final disposition of the first referral until the Board varies or revokes it. The Board's decision of August 29, 1985 is consistent with the Board's practice when faced with a withdrawal request late in the proceedings. In such circumstances, the Board will dismiss the matter before it having regard to the stage of the proceedings. There is nothing in the circumstances of this case which would lead us to conclude that the Board did anything but follow its usual practice when the applicant in the first referral requested that that matter be withdrawn. Although it is unnecessary for the Board to decide the issue for the purposes of this ruling, we have some doubts as to whether a request to clarify a decision is a proper request under section 106(1) where, as appears to be the case here, the respondent is not requesting the Board to vary or revoke its decision. In a particular case, there may very well be sound labour relations reasons which would cause the Board to defer a matter

until a reconsideration request is dealt with. In the Board's view, those circumstances were not present in this case.

9. The Board was also satisfied that it should not refuse to hear the present referral on the basis that the matters raised therein were *res judicata* as a result of the Board's decision dated August 29, 1985 dismissing the first referral. The principle of estoppel by *res judicata* is based on public policy considerations and is designed to avoid repetitious litigation and to ensure that the same person is not sued twice for the same cause. See *The Law of Evidence in Civil Cases*, Sopinka and Lederman, at pg. 365 and *Losereit Sales and Services Ltd.*, [1983] OLRB Rep. July 1090 at paragraph 13. In *Angle v. Minister of National Revenue*, [1974] 47 D.L.R. (3d) 544 (S.C.C.), at page 555, the Court refers to the two aspects of estoppel by *res judicata* as follows:

In earlier times *res judicata* in its operation as estoppel was referred to as estoppel by record, that is to say, estoppel by the written record of a Court of record, but now the generic term more frequently found is estoppel *per rem judicatam*. This form of estoppel, as Diplock, L.J. said in *Thoday v. Thoday*, [1964] p. 181 at p. 198 has two species. The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a Court of competent jurisdiction. ... The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins, J., of the High Court of Australia in *Hoysted et al. v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537 at pp. 560-561:

I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue estoppel").

Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p. 935, defined the requirements of issue estoppel as:

... (1) that the same question has been decided: (2) that the judicial decision which is said to create the estoppel was final: and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

10. The Board agrees with counsel for the union's argument that the facts before us do not support a cause of action estoppel. The grievance before us does not involve the same work, project, subcontractor or provincial agreement as the grievance which gave rise to the first referral. In order to establish the basis for the application of issue estoppel, one must establish that there has been an earlier adjudication which should preclude a further adjudication on the matter between the same parties. As noted earlier, the Board's decision dated August 29, 1985 dismissing the first referral was consistent with its practice when confronted with a request to withdraw a matter late in the proceedings. The decision to dismiss the first referral was not based on any adjudication on the merits. Although the hearing was completed, the withdrawal request from the applicant pre-empted an adjudication on the merits of the first referral. Therefore, the Board concluded that the nature of the first referral and the Board's decision of August 29, 1985 dismissing it should not cause the Board to dismiss the present referral.

11. We turn now to the substance of the grievance dated April 24, 1987 which forms the basis of the present referral. The grievance, which was filed by the applicant's solicitors, reads as follows:

We are solicitors for the Ontario Council of the International Brotherhood of Painters and Allied Trades ("the Union") and are retained with respect to the following grievance.

By virtue of the Working Agreement dated July 10th, 1967 between Harbridge & Cross Limited

(“the Employer”) and the Toronto-Central Ontario Building and Construction Trades Council and by operation of the *Labour Relations Act*, the Employer is bound by the Provincial Agreements binding upon the unions affiliated with the said Council, including the above-noted Provincial Agreement binding upon the Union.

We herewith give notice that the Union on its own behalf and on behalf of its unemployed members grieves that the Employer has violated the said Provincial Agreement at its projects for Bell Canada at 5253 Hurontario Street, Mississauga and for the Chinese United Church at 3300 Kennedy Road, Scarborough (“the Projects”) in that the Employer has failed or refused to subcontract painting work covered thereby only to a sub-contractor bound by the said Provincial Agreement, contrary to Article 23 of Appendix “A” thereto. At all material times to this grievance, there have been, and still are, contractors who are bound by the said Provincial Agreement who are qualified to perform such work at the Projects and who are, and have been, ready, willing and able to perform such work for the Employer.

RELIEF SOUGHT:

1. A Declaration that the Employer has violated the above-noted Provincial Agreement and continues to violate the Provincial Agreement as hereinbefore set forth;
2. An Order that the Employer cease and desist from continuing to violate the Provincial Agreement as hereinbefore set forth;
3. An Order that the Employer subcontract work covered by the Provincial Agreement only to subcontractors who are bound by the said Provincial Agreement in accordance with Article 23 of Appendix “A” thereto;
4. Damages against the Employer by reason of the aforementioned violations of the Provincial Agreement including interest at the current bank rate;
5. Such further and other relief as may be appropriate in the circumstances.

We wish to advise that we have been instructed to refer this grievance to arbitration by the Labour Relations Board pursuant to Section 124 of the Ontario Labour Relations Act.

12. The Ontario Council of Painters takes the position that the Working Agreement dated July 10, 1967 created bargaining rights in its favour with Harbridge & Cross Limited which have never been terminated. It is argued that the existence of these bargaining rights and the operation of the province-wide bargaining provisions of the *Labour Relations Act* bind Harbridge & Cross Limited to the Painters’ Provincial Agreement. Counsel for the applicant argues that Harbridge & Cross Limited contravened the Painters’ Provincial Agreement when it sublet painting work covered by that agreement to non-union subcontractors. In essence, the dispute between the parties centres on the nature and effect of the Working Agreement.

13. The Working Agreement reads as follows:

WORKING AGREEMENT

Agreement dated the 10th day of July A.D. 1967

Between: HARBRIDGE & CROSS LIMITED,
1920 Weston Road, Suite 214,
Weston, Ontario.

hereinafter referred to as “The Company”

THE TORONTO BUILDING AND CONSTRUCTION TRADES COUNCIL

hereinafter referred to as "The Council"

The parties hereto hereby expressly covenant and agree as follows:

PURPOSE

1. The general purpose of this agreement is to establish mutually satisfactory relations between the Company and its employees; to eliminate unfair practices; to establish and maintain satisfactory working conditions, hours of work and wages and to stabilize and encourage the construction industry.

RECOGNITION

2. The Company recognizes the Council and its affiliated unions as the collective bargaining agency for all its employees.
3. The Company agrees that it will employ only members of the unions affiliated with the Council and will let contracts or sub-contracts only to individuals or companies whose employees are members in good standing in the unions affiliated with the Council and will do all things necessary to insure that only members of the unions affiliated with the Council are employed in construction work in which the Company is engaged.
4. The Council through its affiliated unions will supply competent workmen to do the work of any trade or calling that may be required by the Company in the trades represented by the Council.

WAGES, HOURS AND WORKING CONDITIONS

5. The Company agrees to recognize and be bound by the agreements existing between each of the unions affiliated with the Council and the Toronto Construction Association and specifically agrees that the provisions relating to wages, hours and working conditions set forth in the said agreements shall be binding on the Company. In the event any of the said conditions of any of the said agreements are altered or amended at any time during the currency of this agreement, the Company shall be bound by such alterations and amendments. The said agreements are available for inspection by the Company at the office of the Council at 1220 Yonge Street; at the Toronto Construction Association, 92 Yorkville Avenue, Toronto; and at the Department of Labour, Parliament Buildings, Toronto. The Council shall notify the Company of any amendments or alterations of the said agreements.

TERMINATION

6. This agreement shall remain in force for a period of one year from the date hereof and shall continue in force from year to year thereafter unless in any year not less than sixty days before the date of its termination, either party shall furnish the other with notice of termination of, or proposed revision of, this agreement; PROVIDED, however, that this agreement shall remain in full force and effect until completion of all jobs that have been commenced during the operation of this Agreement.

IN WITNESS WHEREOF the parties hereto have caused this agreement to be executed by their duly authorized representatives.

Signed on behalf
of the Company

Signed on behalf
of the Council

"illegible"

"illegible"

"illegible"

"illegible"

14. The Board will summarize the parties' submissions. In his argument, counsel for the union took us through each paragraph of the Working Agreement and argued that the recognition clause was very broad. He submitted that in paragraph 2 of the Working Agreement, Harbridge & Cross Limited recognizes the Toronto B.T.C. and its affiliated unions as the collective bargaining agency for all its employees. District Council 46, which is affiliated with the Ontario Council of Painters is an affiliate of the Council and, therefore, covered by the recognition clause in paragraph 2 of the Working Agreement. In paragraph 5 of the Working Agreement, Harbridge & Cross Limited agrees to recognize and be bound by the agreements existing between each union affiliated with the Council and the Toronto Construction Association ("TCA"). By operation of paragraph 5, Harbridge & Cross Limited became bound by the collective agreements between the TCA and those unions referred to in paragraph 8 of the agreed statement of facts, namely the civil trades. Counsel argued that the effect of paragraph 5 of the Working Agreement was not intended by the parties to limit the broad application of the recognition provisions of the Working Agreement. It was noted that paragraph 5 of the Working Agreement is of less significance since the advent of provincial bargaining. Counsel described the Working Agreement as a standard form agreement and referred to a number of Board decisions interpreting the Working Agreement and its effect. For example, we were referred to *Napev Construction Limited*, unreported, dated April 26, 1979, Board File No. 2121-78-M and *M. J. Guthrie Construction Limited*, [1984] OLRB Rep. Jan. 50.

15. Counsel for the respondent essentially made two arguments in support of the respondent's position that the only effect of the Working Agreement is to bind Harbridge & Cross Limited to the six civil trade provincial agreements. Counsel emphasized that notwithstanding the standard form agreement and the Board's previous decisions, the referral must be decided on the basis of the agreed statement of facts and the Working Agreement signed between Harbridge & Cross Limited and the Toronto B.T.C. Counsel submitted that the facts set out in paragraphs 8 and 9 of the agreed statement of facts are crucial and unique. He noted that the only collective agreements covered by paragraph 5 of the Working Agreement are the six TCA civil trade agreements and that these are the only collective agreements referred to anywhere in the Working Agreement. Counsel noted, as well, that the only employees employed by Harbridge & Cross Limited when the Working Agreement was signed and since that time have been employees represented by the six civil trades.

16. Counsel's first argument centred on the interpretation of the various provisions of the Working Agreement. Counsel noted that the operative words in paragraphs 1 and 2 of the Working Agreement are "its employees" and that no mention is made in paragraph 3 of the Working Agreement to collective agreements. With respect to paragraph 5 of the Working Agreement, counsel emphasized that portion of the paragraph referring to "agreements existing" and noted that at the time the Working Agreement was executed the only agreements in existence were the six civil trade agreements. Counsel submitted that one must read paragraphs 2 and 5 together in order to discern the intention of the parties which was to create bargaining rights for only the six civil trades. Counsel argued that the specific language in paragraph 5 should be given preference to the general language in paragraph 2 of the Working Agreement.

17. Counsel also argued that paragraph 2 of the Working Agreement cannot qualify as a recognition agreement under the *Labour Relations Act*. Counsel submitted that a valid recognition agreement under the Act must contain a defined bargaining unit as evidenced by sections 5(3), 16(3), 60(1) and 144(4) of the Act. Counsel argued that the various paragraphs of the Working Agreement do not contain words which constitute a defined bargaining unit. Counsel notes that paragraph 5 of the Working Agreement has the effect of incorporating the six TCA civil trade agreements with their defined bargaining units contained in their respective recognition clauses.

But outside of the six TCA agreements, the Working Agreement contains no defined bargaining unit and, therefore, cannot create bargaining rights for other affiliates, including the Painters. In support of the second argument, counsel relied on *M. J. Guthrie Construction Limited, supra*, and *V. K. Mason Construction Ltd.*, [1969] OLRB Rep. Apr. 131.

18. In reply, counsel for the applicant took the position that paragraphs 2 and 5 of the Working Agreement deal with different matters and cannot be read together to produce the effect as suggested by counsel for the respondent. The principle of interpretation that specific terms prevail over the general has no application here since paragraphs 2 and 5 deal with different matters. Counsel submitted that the Working Agreement must be read as a whole and that the words in paragraph 2 must be given their normal meaning. Counsel argues that the Working Agreement does contain a defined bargaining unit and that, in any event, the recognition clause of any affiliate's provincial collective agreement is incorporated by the Working Agreement, not just those in the civil trade agreements.

19. This is not the first occasion the Board has had to grapple with a working agreement of the type between the Toronto B.T.C. and this respondent. In previous decisions, the Board has concluded that a working agreement can give rise to bargaining rights. We accept Mr. Binning's position that this application must be decided on its own facts and the arguments made before us. However, it is useful to review briefly the way in which the Board has previously analyzed and characterized the type of working agreement we have before us.

20. In *M. J. Guthrie Construction Limited*, [1984] OLRB Rep. Jan. 50, the Board analyzed at some length a working agreement which had terms virtually identical to those contained in the Working Agreement relied upon by the applicant. In paragraph 13, the Board notes that:

13. ... Working agreements have become very much a part of the unionized portion of the construction industry in the Toronto area and have been regarded as peace treaties and instruments for harmony in the construction industry. However, regardless of these characterizations, the working agreement has traditionally been used, as in the instant case, as an entry into unionized construction work and as a method for an employer to stay on side from the point of view of the craft trade unions in the construction industry. ...

21. In paragraph 16 of *Guthrie, supra*, the Board summarizes the substance of the working agreement before it. This summary, which is set out below, has equal application to the Working Agreement between the Toronto B.T.C. and Harbridge & Cross Limited.

16. The working agreement is a brief document which names the parties and states its purpose as the establishment of mutually satisfactory relations between Guthrie and its employees and satisfactory working conditions, hours of work and wages. In the recognition portion, Guthrie recognizes the Council and its affiliated unions as the collective bargaining agency for all of its employees. Guthrie has also agreed to employ only members affiliated with the Council and to subcontract only to individuals or companies whose employees are members in good standing in the unions affiliated with the Council and to do all things necessary to ensure that only members of the unions affiliated with the Council are employed in construction work in which Guthrie is engaged. The Council has agreed through its affiliated unions to supply competent workmen to do the work of any trade or calling that may be required by Guthrie in the trades represented by the Council. Guthrie has also agreed to recognize and be bound by the agreements existing between each of the unions affiliated with the Council and the Toronto Builders' Exchange and has specifically agreed that the provisions relating to wages, hours and working conditions set forth in these agreements are binding on it. Guthrie has also agreed to be bound by any alterations and amendments to these agreements and the Council has agreed to notify Guthrie of such alterations or amendments. Finally, the working agreement is said to remain in effect for one year and to continue in effect from year to year subject to notice.

22. The Board in *Guthrie, supra*, proceeded to determine that the Toronto-Central B.T.C.

is not a trade union but rather a council of unions. As such, the Toronto-Central B.T.C. could not enter into either a collective agreement or a voluntary recognition agreement in its own name. Each of the affiliates of the Toronto-Central B.T.C. are trade unions which are able to enter into collective agreements and voluntary recognition agreements. The Board concluded that, through the working agreement, the Council entered into a series of recognition agreements on behalf of each of its affiliates with Guthrie.

23. We turn now to the instant application. In essence, the issue before us is whether the Painters acquired bargaining rights by means of the Working Agreement signed between the Toronto B.T.C. and Harbridge & Cross Limited. Harbridge & Cross Limited did not take the position that the Working Agreement was not lawfully executed or that the Painters had abandoned its bargaining rights, if it had any. The parties have agreed that Harbridge & Cross Limited duly entered into the Working Agreement with the Toronto B.T.C., that the Toronto-Central B.T.C. stands in the same relation to the respondent as did the Toronto B.T.C. prior to July 1, 1979, and that, at all times material, District Council 46, an affiliate of the applicant, was an affiliate of the Toronto B.T.C. and since July 1, 1979 of the Toronto-Central Ontario B.T.C. It is not disputed that if the applicant has bargaining rights with the respondent then by virtue of the province-wide bargaining provisions of the Act enacted in 1977, Harbridge & Cross Limited would be bound by the Painters' Provincial Agreement in the industrial, commercial and institutional sector of the construction industry. The parties have agreed that Harbridge & Cross Limited sublet painting work covered by the Painters' Provincial Agreement to painting subcontractors who are not bound by the Painters' Provincial Agreement.

24. In determining the issue of whether the Working Agreement creates bargaining rights for the Painters, the Board has relied only on the facts as agreed to in the agreed statement of facts, the exhibits which were all entered on consent and the parties' submissions.

25. The Working Agreement between the applicant and respondent contains a very broad recognition clause. In paragraph 2 of the Working Agreement, Harbridge & Cross Limited agreed to recognize the Toronto B.T.C. and its affiliated unions as the collective bargaining agency for all its employees. The specific words used in paragraph 2 do not contain any indication that the parties to the Working Agreement intended Harbridge & Cross Limited to recognize a limited number of affiliates rather than all of the Council's affiliates as collective bargaining agents for its employees. Reference is also made to the affiliated unions in paragraphs 3 and 4 of the Working Agreement and these references, as well, contain no indication that there was an intention to apply these paragraphs to some affiliates but not to others.

26. Paragraph 5 of the Working Agreement provides that Harbridge & Cross Limited agrees to recognize and be bound by the agreements existing between each of the unions affiliated with the Toronto B.T.C. and the T.C.A. It is clear from paragraph 5 of the Working Agreement that the term agreements refers to collective agreements. On the facts before us, paragraph 5 would bind Harbridge & Cross Limited to only the civil trade agreements with the T.C.A. Every collective agreement is deemed by the Act to provide for a recognition clause. If the parties to the Working Agreement intended the Working Agreement to create bargaining rights for only those affiliates who had collective agreements with the T.C.A., then paragraph 2 of the Working Agreement would be unnecessary. The parties to the Working Agreement could have easily created this result by only including paragraph 5 in the Working Agreement. The presence of paragraph 2 of the Working Agreement indicates that the parties did not intend to limit bargaining rights to only those affiliates who had a collective agreement with the T.C.A. This view is supported further by paragraph 4 of the Working Agreement which provides that the affiliated unions will supply competent workmen to do the work of any trade or calling that may be required by the respondent in

the trades represented by the Toronto B.T.C. This obligation on the affiliates is not limited to the six civil trades.

27. Both counsel made submissions with respect to which rule of interpretation should be adopted when attempting to interpret the provisions of the Working Agreement. When attempting to interpret an agreement, a general guide to interpretation is to presume that all the words were intended to have some meaning. In utilizing this guide, the Board is satisfied that meaning can be given to both paragraphs 2 and 5 of the Working Agreement and that these paragraphs do not conflict. When reviewing the document as a whole, the Board is satisfied that the parties to the Working Agreement intended that Harbridge & Cross Limited recognize the Council and each of its affiliated unions as collective bargaining agents for its employees. Paragraph 5 addresses what collective agreements Harbridge & Cross Limited will be bound to. Paragraph 2, which creates bargaining rights for all affiliates with the respondent does not conflict with paragraph 5 which simply addresses the question of what collective agreements Harbridge & Cross Limited will be bound by. An examination of the headings used in the Working Agreement further support the proposition that paragraph 2 and paragraph 5 address separate matters. Paragraph 2 is under the heading "RECOGNITION" while paragraph 5 is under the heading "WAGES, HOURS AND WORKING CONDITIONS".

28. The Board does not accept counsel for the respondent's first argument with respect to how the Working Agreement should be interpreted. The Board is satisfied that the provisions of the Working Agreement do not disclose that the parties intended to create bargaining rights for only the six civil trades. In addition to the comments above, the Board notes that it is significant that the Working Agreement is an agreement between the Toronto B.T.C. and Harbridge & Cross Limited. Not only does paragraph 2 refer to the Toronto B.T.C.'s affiliates but one would assume that when the Toronto B.T.C. acted it would do so on behalf of all its affiliates unless there is something in the document which would suggest otherwise. Neither paragraph 5 of the Working Agreement nor any other clause in the Working Agreement suggest otherwise.

29. The other position advanced by counsel for the respondent is that the Working Agreement does not create bargaining rights for the Painters or the other affiliates except the six civil trades, since it does not contain a defined bargaining unit. He argues that the incorporation of the recognition clauses in the collective agreements between the six civil trades and the T.C.A. satisfies the requirement for a defined bargaining unit and, therefore, gives validity to the Working Agreement as a voluntary recognition agreement for only the six civil trades. In the Board's view, the Working Agreement does define the parameters of the bargaining rights to the degree necessary to satisfy the requirement of a defined bargaining unit. The Board agrees with *Guthrie, supra*, in its characterization of the working agreement. By means of one document, the Toronto B.T.C. entered into a series of recognition agreements between all of its affiliates, including the Painters and Harbridge & Cross Limited. The Toronto B.T.C.'s affiliates are trade unions which are representative of certain well-defined trades in the construction industry. Paragraph 2 of the Working Agreement provides, in effect, that Harbridge & Cross Limited recognizes the Toronto B.T.C. and its affiliated unions as the bargaining agent for all of its employees. The term employees can only refer to those employees of the respondent engaged in construction work who would normally perform work performed by members of the Toronto B.T.C.'s affiliates. Paragraph 3 of the Working Agreement makes reference to the phrase "employ only members of the unions affiliated with the Council". As noted earlier, paragraph 4 of the Working Agreement obliges each affiliated union to "supply competent workmen to do the work of any trade or calling that may be required by the Company in the trades represented by the Council". In other words, the Plumbers union is required to supply its members to the respondent, and the Carpenters union is required to supply its members, etcetera. When one reviews the Working Agreement as a whole, and particularly

paragraphs 2, 3 and 4 contained therein, the Board is satisfied that the Working Agreement does contain, in effect, defined bargaining units and constitutes a voluntary recognition agreement under the *Labour Relations Act*. The Working Agreement contains a defined bargaining unit even in the absence of the incorporation of a collective agreement by the operation of paragraph 5 of the Working Agreement.

30. In support of his second argument, counsel for the respondent referred to certain comments of the Board in *Guthrie, supra*, and *V. K. Mason Construction Ltd., supra*. We have reviewed these decisions and were not persuaded that they should lead us to a conclusion different from the one expressed in the previous paragraph of this decision. In *Guthrie, supra*, the Board did not have to address whether the Working Agreement contained a defined bargaining unit in the absence of the incorporation of certain collective agreements, since there existed, it appears, collective agreements which would be incorporated by paragraph 5. This precise issue does not appear to have been argued in *Guthrie, supra*. The working agreement before the Board in the *V. K. Mason* case, *supra*, is not set out in its entirety in the decision. From those portions which are set out, it appears that the working agreement is significantly different from the Working Agreement before us.

31. During counsel for the respondent's submission, reference was made to paragraph 6 of the agreed statement of facts which refers to the respondent's notice to the Toronto-Central Ontario B.T.C. of its intention to terminate the Working Agreement in 1984. In *Napev Construction Limited and General Contractors Section, Toronto Construction Association*, dated December 28, 1977, Board File No. 1112-77-M [unreported], the Board commented as follows at paragraph 13 regarding the effect of such a notice:

13. Bargaining rights between Napev and Local 506 were created upon the signing of the working agreement between Napev and the Council on March 14, 1974. Napev's letter dated January 14, 1976, purported to terminate this agreement pursuant to paragraph six thereof. However, paragraph six is ineffectual in terminating the bargaining rights which in this instance were created by voluntary recognition. Even though notice under paragraph six may terminate the period of operation of a collective agreement which stands by itself or may be the prelude to a new collective agreement, bargaining rights may only be terminated in accordance with the provisions of The Labour Relations Act. There is nothing before the Board which indicates that Local 506's bargaining rights have been terminated pursuant to The Labour Relations Act.

Since the parties have agreed that no applications have ever been made by the respondent or its employees, nor has any decision been made by the Board to terminate the bargaining rights of the Toronto B.T.C. or the Toronto-Central Ontario B.T.C. or any of their affiliated trade unions for the respondent's employees, the notice of the respondent referred to in paragraph 6 of the agreed statement of facts did not have the effect of terminating bargaining rights. We note that at the time the respondent gave notice to terminate the Working Agreement, the scheme of provincial bargaining had been in place for many years.

32. Accordingly, having regard to these findings, the Board:

- (a) declares that, by virtue of the Working Agreement dated July 10, 1967 between the Toronto Building and Construction Trades Council and Harbridge and Cross Limited, the applicant obtained bargaining rights for those employees of the respondent who perform work within the applicant's jurisdiction;
- (b) declares that the respondent is bound by the Painters' Provincial Agreement;

- (c) declares that the respondent contravened the Painters' Provincial Agreement when it sublet painting work in mid-March 1987 covered by that Agreement at its projects for Bell Canada at 5253 Hurontario Street, Mississauga and for the Chinese United Church at 3300 Kennedy Road, Scarborough to painting subcontractors who are not bound by the Painters' Provincial Agreement;
- (d) directs the respondent to cease and desist from continuing to violate the Painters' Provincial Agreement;
- (e) directs the respondent to pay damages to the applicant on behalf of its members flowing from the violations of the Painters' Provincial Agreement referred to in (c).

33. In the event the parties are unable to agree on the amount of damages owing to the applicant, the Board remains seized of this matter.

3332-86-U Michael Alfred Jones, Complainant v. International Association of Heat and Frost Insulators and Asbestos Workers Union Local 95, Respondent

Duty of Fair Referral - Unfair Labour Practice - Union steward ignored union referral list in order to meet a request for workers on short notice - Union had never deviated from list - Breach of duty

BEFORE: *Robert Herman*, Vice-Chair.

APPEARANCES: *Robert Reid* and *Michael Jones* for the complainant; *Bernard Fishbein*, *Joe deWit* and *Jim Bourne* for the respondents.

DECISION OF THE BOARD; April 25, 1988

1. In an oral decision provided at the conclusion of the hearing on March 28, 1988, the Board ruled that the respondent union had breached section 69 of the Act. That section reads as follows:

69. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

2. Subsequent to the hearing, counsel for the complainant requested written reasons, which the Board hereby provides.

3. The Board found all witnesses to be credible. The only real inconsistency in their evidence was with respect to the date that the referral request was received by the union. In this regard, the Board prefers the evidence of Bourne and deWit.

4. At the time the referral request was received by the union, Jimmy Bourne had been the area steward for approximately one month. As area steward, it was his responsibility to respond to

requests for employees and to administer the union referral list. Bourne had been President of the local for four years, a member of approximately twenty years duration, and the Board is satisfied Bourne was fully familiar with the referral system utilized by the respondent notwithstanding his election as area steward had occurred only recently. The referral system used by the union consisted of numerous rules, including rights of refusal and the right to take short term jobs without going to the bottom of the list. These rules were not in issue. The practice of the union had been to rigorously proceed down the list and offer the job to the member at the top of the list. The evidence suggested that the union had never deviated from this adherence to the list.

5. The employer in question had been using non-union labour for a particular part of the job. When officials of the respondent union discovered this, they were able to convince the employer to terminate its arrangement with the non-union company and to use members of the respondent. At approximately 8:30 p.m. on Sunday, February 1, Bourne received a call from the area steward for the Kitchener area, requesting that Bourne refer two members for a job in Brantford, the two employees to report for work the following morning. It was anticipated that the job would only take three or four days. There was nothing unusual or abnormal about this request. The request was received during the time of the evening Bourne ordinarily set aside for handling such matters, and it was quite common both for such requests to be received Sunday evenings, and for the employees to be required to report the following morning. The number of employees being requested, the number of days they were requested for, and the fact that members of the respondent were being employed to replace non-union employees on site, were all factors common to other requests for employees. As with all such requests, as the employees had to be on site the following morning, a quick response was needed by the area steward.

6. Although Bourne was aware that area stewards were to follow the list, offer the job to the first member on the list, and then proceed down the list until the requisite number of members accepted the referral, Bourne decided to ignore the list. He testified he decided to do so for three reasons: the late time of the day (approximately 8:30 p.m.) that the request was received, coupled with the fact that it was anticipated that the job was only for three or four days; the fact that it was winter and members on the list not living in Brantford would have to travel to the site during winter weather; he wanted members who could check on the job after the work covered by the referral was completed, to ensure that the contractor had not resumed having the work done by non-union employees. Presumably, if these members lived in Brantford they could easily check the job site, as they returned home from their own jobs each evening. Although the Board accepts that Bourne did consider these factors in deciding to ignore the referral list and rules, none of them appear to be of more than minimal relevance. As noted, the time of the evening the request was received was within the normal time Bourne dealt with referral requests. Jobs of only three to four days duration were also regularly referred. There was no evidence, or suggestion, that the weather at the time was abnormally harsh, or was other than the cold conditions of an Ontario winter. There was no impending storm which might reasonably have led Bourne to conclude that employees who had to drive some distance to the site might have difficulty. Finally, members could and did check on jobs to ensure union personnel were being employed regardless of whether they had previously worked on the job. Members would volunteer their time after work to drive by a job site to see whether an employer was honouring the agreement. There was no practice of giving jobs to members who lived near job sites; to the contrary there was no evidence that where a member lived had ever been considered in offering jobs. Again, though new to the area steward position, Bourne was fully aware of these matters.

7. Bourne focused on these three reasons but did not check the list to see if those at the top would satisfy his three concerns. He knew of two individuals who lived in Brantford, Judson and Burns, who were available to be referred, and accordingly, Bourne phoned them and referred

the two of them to the job in question. At the time, the complainant was the third member on the list. It is this referral that the complainant alleged violated section 69 of the Act.

8. The mere fact that the union over many years never departed from the list in terms of offering referrals would not make the referral in question arbitrary. A departure from a referral list is not *per se* arbitrary action, and may not be in breach section 69 of the Act. Union officials responsible for administering a referral list can and must exercise discretion in making referrals. Similarly, the fact that the Board might have made the referral differently does not address whether the Act has been breached. It is not the Board's function under the legislation to attempt to second guess union officials as to the appropriateness of a particular referral. The question for the Board is not whether the Board would have reached a different decision, or whether the union made a mistake, but whether the union acted in a fashion which was arbitrary in all the circumstances. There was no suggestion that Bourne or any other union officer acted in any bad faith manner, and there was no evidence supporting a conclusion that the referral had been made in a discriminatory manner.

9. In an earlier case, *John Cooper*, [1984] OLRB Rep. Jan. 6, the Board wrote as follows:

38. ... Business agents, being human, will make mistakes or errors in judgment and may even appear to be inconsistent from time to time as they respond to the circumstances of the moment, and perhaps, subjective pleas for special consideration. The question is whether that discretion has been abused - for example, to benefit family or friends, or to punish political enemies (see *Joe Portiss, supra*). Obviously nepotism and patronage have no place in the hiring hall system, nor should the Board condone reliance upon obviously extraneous factors. But where a union official honestly turns his mind to the circumstances at hand, and without malice or any improper intent makes a sincere effort to assess the situation and balance competing claims before dispatching employees, we do not think we should readily infer that the decision was "arbitrary" and illegal. The term "arbitrary" in section 69 was intended to connote a decision-making process that is reckless, cursory, consistent with a non-caring attitude or influenced by totally extraneous and irrelevant considerations. The facts of this case do not fall within those parameters at all.

10. Bourne did turn his mind to the issue at hand, and reached his decision without malice or any improper intent. However, Bourne never considered whether following the list would have satisfied fully the concerns that motivated him. Given Bourne's concerns, his position as area steward, the fact that though new to the job he was aware of the operation of the referral system and that the list was rigorously followed, and given particularly that the request in question was not unusual in any respect, the Board found it was arbitrary for Bourne not to have at least considered whether following the list would have met all his concerns.

11. For the above reasons, the Board gave its oral decision that the union had breached section 69.

3160-87-R London and District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, Applicant v. Kitchener-Waterloo Hospital, Respondent

Certification - Practice and Procedure - Pre-Hearing Vote - Whether applicant union entitled to a copy of the employee list - Board analyzing nature of employee list and jurisprudence - Where applicant in a pre-hearing representation vote application requests a copy of the employee list to keep, officer should provide it - Copy of voters list provided to applicant due to stage of proceedings

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Peacock*.

DECISION OF THE BOARD; April 15, 1988

1. By decision dated March 22, 1988, the Board directed the taking of a pre-hearing representation vote in this matter. It also responded to a request by the applicant for a copy of the employee list to keep by declining that request and directing that a copy of the voters list accompany the copy of the decision sent to the applicant. We now give our reasons for that decision.

2. Both parties filed submissions on the issue in letters dated March 11, 1988. Counsel for the applicant notes that the bargaining unit is composed of approximately 450 people. He argues that disclosure "is necessary to ensure an informed electorate" and points to "an emerging trend in Board decisions to provide the equivalent to such a list in teacher pre-hearing applications". Counsel for the respondent refers to "a new internal Board policy" requiring the respondent to provide the applicant with a copy of the employee list and requests a "copy of the policy, together with the reasons therefor, so that I can respond fully on behalf of my client", particularly since, in his view, "the situation is a departure from the Board's earlier practice (and does not seem to be covered by the *City of York Board of Education* principles)".

3. The Board has clearly indicated that the union is entitled to review the employee list without a Labour Relations Officer being present and has directed that the union be provided with a copy of the list which it may keep: *Airline Limousine*, [1985] OLRB Rep. Jan. 1; *Metropolitan Separate School Board*, [1986] OLRB Rep. Dec. 1733. While in both cases the Board of course dealt with specific fact situations and ruled only on those fact situations, it also considered in some detail the interests involved and discussed the Board's approach to the disclosure of employee lists.

4. In *Airline Limousine, supra*, in which an application for certification was made pursuant to section 7 of the Act with respect to the drivers of airline limousines, the composition of the bargaining unit raised several complex issues; the parties met with a Labour Relations Officer in an attempt to resolve or focus the issues and in the course of that meeting, the question of the union's access to the employee lists arose. In dealing with that question, the majority of the Board said the following about the disclosure of the lists to the union before finalization of the bargaining unit description:

12. On an application for certification, when any issue arises concerning the employee list or the composition of the bargaining unit, the Board's longstanding practice is to determine the bargaining unit description, then permit the applicant union to review the list so that it can identify and particularize any challenges. If the union does not request to see the list or question its accuracy, the Board will proceed on the basis of the information contained therein without the necessity of formal proof. But nothing in the Act or the Rules makes that employee list "confidential", nor is it easy to see where the Board would get the authority to withhold information upon which it planned to act, and which was so clearly necessary to its determination. The records of a trade union relating to membership have been accorded specific statutory treat-

ment, as have other documents revealing employee wishes with respect to union representation. (See section 111 of the Act). Section 111 was passed to reverse judicial decisions requiring the production of such documents revealing employee preferences. (See: *Globe Printing Co. v. Toronto Newspaper Guild* [1951] O.R. 435; [1952] 2 D.L.R. 302; [1953] 3 D.L.R. 561.) Maintaining the confidentiality of a union's membership records helps to protect employees from unlawful reprisals by those employers who do not accept the legitimacy of their right to join a union or engage in collective bargaining. However, there is no similar provision prohibiting or restricting disclosure of the list of employees said to be, or found to be, in the bargaining unit.

13. It is not difficult to understand why the employee list is revealed. It would be a little curious if a trade union were to be granted a certificate because it had established the requisite level of support in the bargaining unit described generally, but left the hearing without a precise understanding of the basis on which its application succeeded. On a more basic level, when even a simple certification case involves a comparison of the union's membership evidence with a list of employees in the bargaining unit, and there are statutorily prescribed consequences flowing from that calculation (a vote, outright certification, or dismissal), the union must be entitled to the employee list if it is to participate in the hearing in a meaningful way. How else can it properly protect and advance the rights of its members? How else can it determine whether the employee list is accurate and correct or whether through error, inadvertence, or improper intent the list of employees said to be in the bargaining unit is inaccurate? Now, of course, there may not be very many cases where an employer intentionally misrepresents the number of employees in the bargaining unit. But, as we have already noted, the speed with which the employer must respond to the certification application, the potential complexity of the issues, and the inevitable exercise of judgment will often result in the production of a list which, at least arguably, is not sufficient for the purpose of making the determinations required under sections 6 and 7 of the Act.

14. In our view, there is no sound basis for denying a trade union the opportunity to review the employee list and, in practice, the union has always been given that opportunity. If a question arises concerning the list the union has never been denied an opportunity to review it. Nor is there any good reason why it should not make a copy or take notes, so that it can pursue its inquiries, on its own time. We do not think that it makes sense to draw a distinction between *reviewing the list and taking a copy*, simply because the latter might assist a union in preparing its case or gathering information which could well result in a withdrawal of a challenge. It would be odd to structure a system in such a way as to reward union officials with a good memory, and multiply the difficulties in large bargaining units where there is the greatest potential for error or misjudgement; and we can only speculate about how a court would respond to this "hide and seek" approach to litigation, in which critical assertions of fact may be *revealed* or *reviewed*, but *not copied*, lest the party asserting those facts lose some tactical advantage attributable to the other's ignorance. Adversarial attitudes are prevalent enough in our collective bargaining system, without elevating them to the status of principles governing the process by which employees acquire the right to bargain collectively through a union of their choice. *If, in the course of a certification application, a union is entitled to review the list - as we find that it is - it is our view that the union should be entitled to make a copy, and, again as a practical matter, a union has always been accorded the right to make a list of all unfamiliar names for the purpose of challenge and investigation.* (last emphasis added)

15. It might be said that providing the union with a list of employees gives it an advantage not only in the particular application under review, *but also in some later application*. It might be said that a union should not have the "tactical advantage" of knowing the parameters of the bargaining unit, or the identity of the employees in it, for the purposes of approaching them at some later time to see whether or not they wish to be represented by a trade union. The list might be "abused"; moreover, a calculating union might apply for certification simply to obtain the list for a *future* campaign. If an employer knew that a union would receive a copy of the employee list, the employer might be tempted not to respond to the certification application, or to make an incomplete response. Finally, it might be said that it is "unfair" that a union be permitted to know who the employees are, and the employer is not permitted to know precisely which of those employees have opted to support the union.

16. No doubt there is some basis for these concerns, but in our view they are overstated. First, from a practical point of view, some two-thirds of all bargaining units have less than forty

employees so that a mere perusal will be sufficient to generate an accurate list. It is only in larger bargaining units where a copy of the list gives the union the opportunity for future advantage, but it is precisely in those larger bargaining units that there is greater margin for error by one party or both, and a greater need for a list to identify and investigate the areas of dispute. Employers who believe they may benefit from filing an inaccurate or incomplete reply can do so now, and that fact in itself suggests that a union should have a copy of the list so it can evaluate its position. But the fact is that employers do not usually certify as accurate what they know is not, and unions do not usually file frivolous applications merely for discovery purposes. What does happen quite frequently are innocent errors by the employer, or an innocent miscalculation by the union as to the contours of the bargaining unit and the number of employees in it. Should the Board's process be abused, it has ample authority to deal with the problem.

[emphasis in original]

5. In *Metropolitan Separate School Board*, *supra*, involving an application for certification of full-time Heritage Language instructors, in a previous decision reported at [1986] OLRB Rep. Sept. 1259, the Board had rejected both the bargaining unit descriptions proposed by the applicant and the respondent, and therefore required new lists from the employer in order to identify the persons employed in the unit it had found appropriate. Since that unit included categories of employees the union had not attempted to organize, the Board believed it was "unlikely that the applicant could reasonably determine and state its position with respect to the accuracy of the employer's new lists on the continued hearing date without having some time prior to that date to study the new lists and make any necessary enquiries". Therefore, the Board had directed the respondent to deliver copies of the new lists to the Board *and to the union* by a specified date. In its December 1986 decision declining the respondent's request for reconsideration of that ruling, the Board referred to the majority's comments in *Airline Limousine*, *supra*, which are set out above, and summarized them thusly: "In short, the Board is obliged by the rules of natural justice to provide an applicant union with access to the information in the employer's lists before it acts on that information in making any determination which affects or determines that union's rights".

6. We agree with the analysis in *Airline Limousine*, *supra*, *Metropolitan Separate School Board*, *supra*, and *Nova Scotia Michelin Tire Employees' Local 1699 v. Nova Scotia Labour Relations Board* 86 CLLC ¶14,009 (N.S.S.C.) that natural justice principles require that the union be given an opportunity to review the employee list. Indeed, in *Sudbury Memorial Hospital*, [1974] OLRB Rep. Dec. 871, the Board described the procedure of the Officer's giving the union a copy of the list "for their perusal and verification", to which the respondent objected, as a procedure "used for many years by the Board's examiners". The respondent in this case appears to take the position that any procedure other than the union's having the opportunity to review the list in the presence of a Labour Relations Officer constitutes a "new Board policy". In *Extendicare Diagnostic Services*, [1981] OLRB Rep. Aug. 1134, the respondent objected to the union being given an opportunity to review the employee list on the basis that the anonymity of the employees should be protected or that the employees should be served with individual notice and that the list could be used by the union for future organizing. The Board rejected these submissions and with respect to the third, pointed out that the Board can respond directly to an abuse of process and that "[i]n any event, it is the current Board practice to have a Board officer sit with the union during the review of the list and ensure that the list is not utilized in any way unrelated to the case at hand". The Board did not explain or consider how the officer's presence would have such an effect.

7. On the other hand, it should be noted that the Board in *Sudbury Memorial Hospital*, *supra*, did not see any necessity to refer to the Officer's presence or absence during the time the union reviewed the list. In *Airline Limousine*, *supra*, and *Metropolitan Separate School Board*, *supra*, natural justice principles and practical considerations relating to the efficiency of the certification process led the Board to require disclosure of the list to the union without the presence of a

Labour Relations Officer and at different stages of the process. Permitting the union to review the list without an Officer being present or permitting the union to keep a copy of the list is therefore not a new policy hitherto unrevealed, but rather simply one way in which the Board has determined that the interests manifest in the certification process can be satisfied. Furthermore, in contrast to the Board in *Extendicare Diagnostic Services, supra*, the Board in *Metropolitan Separate School Board, supra*, did consider in some depth the history and value of the Officer's presence while the union reviewed the list (see paras. 8-13 in particular) and concluded that the presence of the Officer could not prevent the abuse hypothesized by those opposing the disclosure of the list. We agree for the reasons cited in *Airline Limousine, supra*, and *Metropolitan Separate School, supra*, that an Officer does not need to be present when the union sees the list. We also observe that this use of an Officer's time and abilities may not be the most efficient use of the Board's resources in any given case, especially in a non pre-hearing vote certification when the Officer may be more usefully engaged in assisting the parties with respect to challenges already made or other disputes, either in that or another case listed for hearing on "certification day".

8. While pre-hearing representation vote applications always involve a meeting by the parties with a Labour Relations Officer and while those meetings take place only a short time after the terminal date, it is nevertheless of no less significance that the examination of the list by the applicant should not depend on an Officer's availability. Expedition is of major importance in such cases; it could be assisted by the applicant's obtaining a copy of the list at the outset of the pre-hearing meeting with the Officer to determine on its own time whether it wishes to challenge the list, a particularly important point in cases involving large bargaining units and pre-hearing meetings lasting more than one day (as did the one in this case).

9. The employer is required to file the employee list by Form 5 of the Board's Rules and Procedures. The employee list is a pleading: it contains facts - the names of employees the employer believes to be in the bargaining unit proposed by the union in its application - which may be disputed by the union. Pleadings are normally exchanged by the parties in accordance with a party's right to information relevant to the issues in dispute or potentially in dispute between or among the parties. There is also a public interest, as well as an interest usually shared by the parties, in a speedy statement and resolution of matters in dispute in a certification application. The employee list provides a starting point for the parties' determination of the voters list which sometimes mirrors the employee list or contains few changes, but which may also contain many additions to or deletions from the employee list. For those reasons, where the applicant in a pre-hearing representation vote application requests a copy of the employee list filed by the employer pursuant to Form 5, to keep, we see no reason why the Officer at the pre-hearing meeting should not provide a copy of the employee list to the union.

10. In this case, had we had an opportunity to rule on the union's request before the issue became moot, on the basis of the submissions before us, we likely would have directed that the union be permitted to keep a copy of the list. We have indicated that there is every reason to support the view, consistent with previous cases, that that would be the appropriate way in which to deal with the matter in the normal course. By the time the matter reached us, however, the parties had agreed on the list for the purposes of the count and on the voters list and there were no outstanding challenges to the list by either party. We therefore do not direct that the Officer now provide the union with a copy of the employee list. The employee list was filed as a document relevant to the litigation. Subject to submissions of employees at the post-vote stage, there are no longer any issues outstanding in the litigation requiring the union's access to the employee list.

11. We should make it clear that our decision in this case is not meant to suggest that we believe that the union is obliged to show that it cannot deal with the relevant issues without the list

(or that an effort to do so must be made before the union may keep a copy of the list). Rather, once the union makes the request, we are of the view that the Officer may properly give the union a copy to keep, consistent with ensuring that the union's right to information relevant to issues involving the union which must be decided is an effective, as well as theoretical, right. The reasons advanced against any disclosure of the list or against disclosure without the Officer being present are also advanced against the union's keeping a copy of the list (see the cases cited *supra*). They have been repeatedly rejected by the Board for reasons which we adopt. Specifically, we agree that any *actual* abuse of the list can be dealt with by the Board in the case in which it arises. This is preferable to refusing to allow the union to keep a copy of the list for fear of a hypothetical misuse, a fear which in our view does not outweigh the requirements of natural justice. Of course, should an employer advance a reason not already considered by the Board, it would be entitled to have the matter heard by a panel of the Board. It is only in this sense that our colleague's statement that "this decision confirms the authority of the Board to decide the disposition of employer lists" applies: the Board always has the jurisdiction to determine whether it should follow its normal practice or whether the specific facts of a case are sufficiently distinct to warrant a departure from normal practice.

12. We note in light of our comments at the beginning of paragraph 10 that the employer was requested to make submissions on the question of the union's keeping a copy of the list; the employer's counsel chose to respond to that direction by requesting "a copy of the policy, together with the reasons therefor" and did not provide any reason why the union should not keep the list in this case. As we have indicated, the cases have clearly communicated that such disclosure may be ordered and have considered the objections advanced generally and in those cases, to such disclosure; as the Board stated in *Metropolitan Separate School Board, supra*, "there can be no doubt after *Airline Limousine Service Limited, supra*, that the proper approach to the timing and manner of disclosure of employee lists is open to consideration on a case by case basis". It is not unreasonable, therefore, for the Board to expect that a party to a certification proceeding make submissions with respect to its position on the question of the union's keeping a copy of employee lists when that question arises in a certification application. We were not given any reason why the union should not keep the list; nor was the Officer apparently given any reason. Therefore, it appears there was no reason for the Officer not to have given the union the list when it was requested by the union during the first day of the meeting.

13. The applicant refers to and relies on the "teacher pre-hearing vote" cases in its request for the employee list. Those cases consider the interest of employees in access to information about the advantages and disadvantages of union representation and the opportunity of the parties to communicate same. Such communication involves those employees who are eligible to vote and thus the cases deal with the voters list rather than the employee list originally filed by the employer. These cases have directed the provision of voters' names and addresses and are therefore not on point with the issue here, although they are indicative of the tendency of the Board to require the disclosure of information, not protected by statutory privilege, it considers useful to decision-making by all participants in the certification process. The Board in *The Board of Education for the City of York, [1985] OLRB Rep. May 767* directed that "when an application for certification in respect of occasional teachers is made under section 9 of the [Labour Relations] Act (the pre-hearing vote section), or a vote of occasional teachers is directed under section 7, the respondent employer will be required to file with the Board a list of the names and addresses of all employees known to it to be in the voting constituency. Such a list will be available to any person or party with a direct interest in the campaign".

14. The requirement that the employer provide names and addresses of employees has been based in the cases on the fact that occasional teachers do not have a settled workplace; in *Queen's*

University at Kingston, [1987] OLRB Rep. June 925, the Board indicated that the lack of attachment of the employees on a regular and consistent basis to a particular work location may not be the only reason the Board would direct the employer to provide the union with names and addresses. It also indicated, however, that the applicant "must clearly explain why its circumstances warrant [such] a direction" and suggested that "such a direction will *usually* be predicated on factors which put the union at a disadvantage vis-a-vis the employer with respect to communicating its position and views to the employees" (emphasis added). Since the provision of addresses involves additional work for the employer and they are not required to be filed with the Board under the Board's Rules, as are employee lists, the Board must be satisfied that it should make such a direction. As a pleading in the application, however, employee lists are on a different footing and it will be the exceptional case, if any, in which they should not be given where a timely request is made. (We observe in passing that in *Queen's University*, *supra*, the Board refused to consider the applicant's request for delivery of such a list because the request had not been made until after the Officer's meeting; no such problem arises here where the union requested the employee list on the first day of the Officer's meeting.)

15. While we are not prepared to direct the employer to give the union a copy of the employee list it originally filed in this case, we are satisfied that the parties should be in possession of the voters list for reasons of communication with the employees in the voting constituency, the main reason given by the applicant for requesting the employee list. Whether or not the employer has in fact communicated with the employees in specific ways before the Officer's meeting (as the applicant alleges in its March 11, 1988 letter), we do not consider that the question of such specific communication is the relevant issue. Quite simply, we are concerned here with whether the union should possess its own copy of a public document. A copy of the voters list is posted next to every Form 69, the Notice of Taking of Vote, which the employer is required to post in the workplace. The employer is in a position at the Officer's meeting to make the changes to the employee list to reflect the voters list as determined by the parties at the meeting and thus the employer effectively has or is able to have a copy of the voters list when it leaves the meeting. The union does not have that same opportunity if it does not keep a copy of the employee list, as in this case. Under the circumstances of this case, we therefore directed that a copy of the voters list was to be sent to the union at the same time that a copy of the March 22, 1988 decision was sent to it.

CONCURRING OPINION OF BOARD MEMBER W. N. FRASER;

1. I agree with the decision in not directing the employer to give the union a copy of the employer list it originally filed in this case, as outlined in paragraph 15. I do however agree that the voters list be given.

2. I believe that this decision confirms the authority of the Board to decide the disposition of employer lists.

3. The decisions referenced in paragraphs 3 to 7 are not, in my opinion, typical and are based on facts which are unique to those cases. I cannot therefore agree with many of the conclusions expressed in this decision which favour giving the employer list to the union. Such a decision should only be made by a panel of the Board.

3159-87-U Syndicat des travailleurs de l'information du Droit, Complainant v. Le Droit, division de groupe Unimedia Inc., Respondent

Duty to Bargain in Good Faith - Unfair Labour Practice - Employer refusing to sign an agreement whose terms both parties had agreed upon - Employer would not sign until a threatened strike by two other units had been settled - Breach of duty - Employer directed to sign agreement

BEFORE: Rosalie S. Abella, Chair, and Board Members W. A. Correll and C. A. Ballantine.

APPEARANCES: L.N. Gottheil, Pierre Lebel and Denis Belisle for the complainant; R. C. Filion, J. Beauvais, G. Cabana and R. Beaulieu for the respondent.

DECISION OF THE BOARD; April 26, 1988

1. The union alleges on behalf of the newsroom and editorial staff at Le Droit that the company violated the duty to bargain in good faith contained in section 15 of the *Labour Relations Act* by refusing to sign an agreement whose terms both parties had accepted. The day after the hearing, on March 30, 1988, the Board issued a decision declaring that Le Droit's conduct violated the duty to bargain in good faith, directing it to sign the agreement as of February 16, 1988, and indicating that reasons would follow. The following are the reasons.

2. The essential facts are not in dispute. Le Droit had been negotiating for many months with 3 of its 5 bargaining units: the unit involved in this dispute, the newsroom and editorial staff (journalists); the production workers; and the office and clerical workers. All of these units had collective agreements which had expired on December 31, 1986.

3. The intervention of a Conciliation Officer was unsuccessful, and after the last meeting with this officer on January 20th, a "no board" report was expected for all three units. The "no board" reports were issued on February 3, 1988.

4. At the request of the union representing the journalists, a meeting was held with company representatives on January 26th to attempt to resolve the outstanding issues. The final and most contentious issue was the union's request for a reduction in the 35 hour work week. Late that evening, Le Droit agreed to reduce the weekly hours to 34, and an agreement was thereby reached. The parties concluded the evening with a celebratory drink and dinner.

5. It was agreed between the parties that although all outstanding issues had been resolved, the signing would take place after each party had had an opportunity to review and approve the final text and four accompanying letters, all of which were to be prepared by the company. The union undertook to recommend acceptance of the agreement to its membership. The membership approved the agreement in principle on January 27th by a vote of 35 to 11.

6. On January 28th, Richard Beaulieu, the chief spokesperson for the company's negotiating team, learned that on December 8, 1987, the union had passed a resolution declaring that it would not sign an agreement unless the company reached an agreement with the other unions. The notion of a "common front" between the unions was not unknown to the company, but it was unaware that the philosophy had been implemented as a formal resolution. Beaulieu expressed his deep disappointment in the existence of the resolution to Pierre Lebel, the union President, as soon as he learned of it. Lebel assured Beaulieu that the resolution could easily be rescinded by the general membership once it had reviewed and approved the final text.

7. Beaulieu sent Lebel a draft agreement the next day, January 29th. Lebel reviewed the document with his committee on February 5th, then called Beaulieu to arrange a meeting with the company so that final corrections could be made. A meeting was arranged for and held on February 9th. At this meeting, virtually all the terms and wording were finalized. Lebel told Beaulieu it would be presented to the general membership on February 11th, along with a resolution to have the December 8th resolution rescinded. Beaulieu stressed his wish of having the agreement signed before February 14th when the two other bargaining units had scheduled a meeting to take a strike vote. He further suggested that the signing be photographed. The union declined the offer of a photographer, but agreed to attempt to have the signing take place before February 14th.

8. At the union's general meeting on February 11th, the final text was presented to the membership. At this meeting, the members agreed to the text, set February 12th as the signing day, and rescinded the December 8th resolution. After this afternoon union meeting, Lebel met with Beaulieu and they agreed that the text would be signed the next day, February 12th, at 4:00 p.m.

9. On February 12th, at 3:45 p.m., Lebel went to see Beaulieu to confirm arrangements for the signing. Beaulieu advised him that he was preoccupied with the production and office workers' negotiations, and had not had time to prepare the four ancillary letters. When Lebel expressed his disappointment, Beaulieu concurred, particularly, he said, because he had hoped to tell the two other units about the existence of the agreement before their February 14th meeting. They both agreed that Lebel would prepare the four letters, and that the signing would take place at the first mutually convenient date, February 16th at 7:00 p.m. Lebel prepared the letters and Beaulieu agreed to their terms before February 16th.

10. At the end of the afternoon on February 16th, Lebel was told by the acting Editor-in-Chief that Beaulieu was in an emergency meeting with the two other units and could not meet to sign the agreement that evening. The next day, Lebel went to Beaulieu's office and asked why he would not sign the agreement. Beaulieu tried to reassure him, and said that he would try to have it signed by the end of the afternoon. They agreed to meet at 3:00 p.m. to discuss the possibility of having it signed that day.

11. Later that day, a company spokesperson told Lebel that the company was refusing to sign the agreement, attributing the decision to Gilbert LaCasse, the President and Publisher of *Le Droit*. The spokesperson said that the agreement would not be signed until the threatened strike by the two other bargaining units had been settled. At their February 14th meeting, these two units had voted to strike on February 20th.

12. Upon learning that the company would not sign, Lebel went to see Beaulieu, who confirmed that while the company was still in agreement with the wording of the text, it was withholding its signature because of the threatened strike. This was the first occasion on which Beaulieu confirmed that the company would not sign the agreement. On February 20th, the production and office workers went on strike, and the journalists received notification from the company that they would be laid off during the strike.

13. Gilbert LaCasse explained in evidence that he agreed to the January 26th settlement because he hoped that it would inspire the two other units to settle. *Le Droit* had suffered serious and increasing financial difficulties over the past four years which LaCasse, appointed in January, 1987, had hoped to reverse through, among other methods, negotiations with the unions. LaCasse candidly admitted that when it became obvious that the salutary effect of the settlement with the journalists had not materialized, he made the decision not to sign the agreement. The combination of the strike and the daunting loss of income a cessation of publication would generate, led

LaCasse to conclude that there was no point in signing an agreement when the company was headed for "disaster".

14. Neither the deteriorated financial condition of Le Droit nor the possibility of a strike in the winter of 1988 were unknown to either party during these negotiations. Both factors figured prominently in the timing and terms of the January 26th agreement. Nor did the union's December 8th resolution, when disclosed to the company, divert the process or the company's willingness to pursue it to its signed conclusion. Both parties, knowing of this resolution, the precarious finances, and the possibility of a strike, had nonetheless concluded every term and word of an agreement and were anxious to have it signed at the earliest, logically feasible moment. There was no change in circumstances, or unforeseen obstruction; rather, one of the potential scenarios surfaced with the strike vote, intensifying rather than exposing a critical situation. The bargain was made in the shadow of this pending crisis, but made nevertheless. Having been made, the section 15 duty to bargain in good faith and make every reasonable effort to make a collective agreement was violated by the company when it refused the agreement's execution because its hopes for a domino strategic effect on the two other units were thwarted. The Board's jurisprudence clearly indicates that where, in circumstances such as these, the parties have bargained for and agreed to all the terms of a collective agreement, it is a violation of section 15 for the company to resile from that agreement. (*Corporation of the City of Thunder Bay*, [1983] OLRB Rep. Oct. 1722; *Coulter Copper & Brass Limited*, [1981] OLRB Rep. May 519; *Selinger Wood Limited*, [1980] OLRB Rep. Nov. 1688; *Graphic Centre (Ontario) Inc.*, [1976] OLRB Rep. May 221; *Municipality of Casimir, Jennings & Appleby*, [1978] OLRB Rep. June 507; *Fotomat Canada Limited*, [1981] OLRB Rep. Feb. 145; *Treco Machine & Tool Limited*, [1982] OLRB Rep. Dec. 1954; *Saville Food Products, Inc.*, [1986] OLRB Rep. Apr. 552; *Sparton of Canada Limited*, [1985] OLRB Rep. Sept. 1420.)

15. For all the above reasons, the Board concluded that the company had violated section 15, and directed that the company forthwith execute the agreement as of February 16th.

1017-87-G The Mechanical Contractors Association of Hamilton, Applicant v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67, Respondent

Construction Industry Grievance - Joint Apprenticeship and Training Committee governed by a "trust agreement" which is not part of the collective agreement - Dispute between parties over the number of individuals admitted to the trade and the criteria for admission - Collective agreement not regulating the internal workings of the Committee - Grievance dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *D. A. MacDonald* and *C. A. Ballantine*.

APPEARANCES: *C. E. Humphrey*, *R. Dunn* and *C. Nolan* for the applicant; *S. Simpson* and *F. Wilson* for the respondent.

DECISION OF THE BOARD: April 27, 1988

I

1. This is the referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act*. The applicant, The Mechanical Contractors Association of Hamilton ("MCAH") contends that the respondent Local 67 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("Local 67"), has contravened Article 112 of the collective agreement by which it is bound. Article 112 reads as follows:

APPRENTICES

Article 112

112.1 To assure the Industry of an adequate supply of properly trained and qualified Mechanics, a Joint Apprenticeship and Training Committee has been formed. This Committee consists of six (6) members. Each of the parties to this Agreement has appointed three (3) members. The J.A.T.C. shall be responsible for the administration of local apprenticeship standards and for co-ordinating them with the Apprenticeship Act.

All applicants for apprenticeship must make application and be approved by the J.A.T.C., excepting U.A. members transferred from other areas. All apprentices must obtain a work referral slip from Local 67 before commencing work.

112.2 When an employer has been notified by the Industrial Training Branch that an apprentice has passed his Certificate of Qualification examination, he will be paid the journeyman's rate of wages retroactive to the date of completing his contract provided it can be shown that the apprentice made application and paid the necessary fee to the Industrial Training Branch at least sixty (60) days prior to completion of the hours required in his contract. The Secretary of the J.A.T.C. will notify Local 67, the apprentice and the Industrial Training Branch when an apprentice is approximately three (3) months from completion of his apprenticeship. If an apprentice fails his first Certificate of Qualification examination, the effective date of him receiving journeyman's rate of wages shall be the date on which he passes a future Certificate of Qualification examination.

112.3 No first year apprentices without a contract shall be hired while there are unemployed apprentices. This shall apply to each branch of the trade.

112.4 When an apprentice is to be laid off, he is to have one week's notice in advance to the time of lay-off. This shall apply to each branch of the trade.

112.5 When an apprentice is laid off the Employer may not hire a new apprentice in his place while that apprentice is still unemployed. This shall apply to each branch of the trade.

112.6 When lay-off occurs, apprentices with less than two (2) terms' service with the Employer shall be laid off first. For all other apprentices length of service with the Employer will be the prime consideration in determining lay-offs. This shall apply to each branch of the trade.

112.7 One (1) apprentice may be employed in the shop or on the job when there are from one (1) to three (3) journeymen employed, two (2) to six (6) journeymen, three (3) to eleven (11) journeymen, four (4) to sixteen (16) journeymen, and one (1) for each additional four (4) journeymen. This ratio shall apply to each branch of the trade and shall be maintained when lay-off takes place.

The employers' complaint is this:

The Mechanical Contractors Association of Hamilton grieves that the Union is violating the provisions of Article 112 of Appendix 9 and Appendix 9A of the Collective Agreement by:

1. maintaining the position that and directing its representatives of the Joint Apprenticeship and Training Committee (JATC) to maintain the position that the JATC has the

right to determine the number of apprentices to be made available to contractors which are members of the Mechanical Contractors Association of Hamilton.

2. insisting that the Union and the Mechanical Contractors Association of Hamilton pre-determine the number of apprentices to be approved contrary to Article 112 of Appendix 9 and Appendix 9A of the Collective Agreement.
3. through its own acts and the acts of its representatives on the JATC, limiting the number of applicants for apprenticeship which will be approved on a basis other than that provided for in Article 112.1 of the Collective Agreement.
4. maintaining the position and directing its representatives on the JATC to maintain the position that contractors do not have the right to select apprentices then have them approved by the JATC provided that they meet the standards properly established by the JATC.
5. maintaining the position that the JATC has the right to refuse approval to apprentices on the basis of the number of apprentices to be approved rather than whether or not the apprentice meets the standards established by the JATC.
6. making use of the JATC to control the number of apprentices available to contractors in a manner contrary to the provisions of Article 112.7 of Appendix 9 and Appendix 9A of the Collective Agreement.

2. A hearing in this matter was held in Toronto on December 7 and 9, 1987. The parties were agreed that the Board had jurisdiction, in a broad sense, to hear and determine the matters in dispute between them; however, the union's position was that the issues raised in this grievance are not arbitrable because they are not addressed by the terms of the current provincial collective agreement. Notice of these proceedings was given to both The Mechanical Contractors Association of Ontario ("MCAO") and the "Ontario Pipe Trades Council", which are, respectively, the employer and employee provincial bargaining agencies. Neither the MCAO nor the Pipe Trades Council intervened in these proceedings.

II

3. For many years (indeed, before the establishment of the current provincial bargaining scheme) Local 67 and MCAH have had a Joint Apprenticeship and Training Committee ("JATC"). The JATC is composed of representatives from the local union and the local contractors. The purpose of the JATC is to oversee the intake of apprentices into the trade, assess their qualifications, and monitor the disbursement of monies from training funds to which the contractors contribute.

4. In 1976 the representatives of the local contractors and Local 67 entered into what was described as a "trust agreement" governing the operation of the JATC, the disposition of "trust funds" and other related matters. That trust agreement was signed by representatives of both the local contractors and Local 67. The trust agreement included a mechanism for resolving disputes which might arise from time to time between the union and employer trustees. Such disputes were to be referred to arbitration. The trust agreement was not then, and is not now, a part of the collective agreement.

5. The evidence does not establish any occasion on which the parties have had to resort to that arbitration process. For a number of years there were no problems, and, accordingly, it has not been necessary to test either the legal validity, or the practical efficacy of the arbitration provisions of the "trust agreement". More importantly, the trust agreement really was a matter of "trust" in its commonly understood rather than its strict legal sense. Indeed, the trustees, from

time to time, were not very careful about the legal niceties of their relationship or their successorship. They didn't have to be. At that time, the system was working. It represented an accommodation to which the parties had agreed and were prepared to adhere.

6. Cameron Nolan became Executive Director of MCAH in December 1983. He decided that the trust agreement was not binding and that its terms need not be followed. The fact that it had been signed some years before by the then representatives of the local employers was not, in his opinion, determinative. Not surprisingly, Local 67 considered this to be a breach of faith, whatever the "strict legalities" of the situation. The trust agreement represented an agreed-upon means of resolving matters of interest to both MCAH and Local 67, and the union did not welcome Nolan's repudiation of the parties' previous understanding.

III

7. In 1978 there was a large intake of apprentices in the Hamilton-Brantford area, because of an anticipated expansion of work opportunities in the trade. Unfortunately, that prediction turned out to be wrong. Shortly thereafter, there was a significant downturn in the local economy and a very high level of local unemployment. As a result, many of the individuals earlier admitted to the trade had a very difficult time accumulating the number of hours necessary to qualify for "journeyman status" within the anticipated 5-year program.

8. In the union's view it was inappropriate and unfair to subject apprentices to years and years of sporadic training with only an uncertain prospect of final accreditation. The union asserted that the number of apprentices and their personal needs should be matched to the anticipated industry demand - bearing in mind that it was always easier to limit applicants at the entry point rather than later on in the training stream when they would have an investment in, and expectation of, eventual success. The result was a marked reluctance on the union's part, to agree to any further large intake of apprentices. In light of the unfortunate experience in the early 1980s, in the last few years the JATC has authorized only a relatively small increase in the number of individuals admitted to the trade.

9. The present dispute involves not only the number of individuals admitted to the trade, but also the terms or criteria for admission. There is an established procedure, agreed upon by the parties, which involves the evaluation of candidates based upon their educational background, their performance on a written test, and an interview by industry representatives. That process of evaluation has been in place for a number of years.

10. According to Cameron Nolan, however, the contractors are not satisfied with that procedure. As he puts it, the contractors want to inject more "subjectivity" into the process. The contractors are not comfortable with a "meritocracy" based upon the previously-agreed evaluation procedures. They want the JATC to admit as qualified and potential apprentices, all individuals who have satisfied the *minimum* standards of performance. The contractors assert that from this pool of persons who meet the *minimum* requirements, they should be able to choose to employ whomever they wish.

11. The union's position is that those approved by the JATC should be the *best qualified* of the potential applicants, not those who are only minimally qualified, and that however large the pool may be, selection should be on the basis of merit as determined by the JATC. Having agreed to the method of assessment, the union, through its representatives on the JATC, is prepared to live with the results and accept for admission only the most promising candidates. Insofar as the issue of "numbers" is concerned, the union asserts that the "numbers" should be selected from "the best" and be sufficient to meet the industry's established needs. It is the union which asserts,

in effect, that "we want only the best", and the employers which assert that "second best will do" if the candidates meet our unspecified and unregulated minimum criteria and entirely subjective preferences. Indeed, while MCAH now quarrels with the position of the JATC, it appears from the JATC minutes that as late as June 18, 1987 the JATC, *by a majority*, itself agreed upon a process of apprentice intake based upon its own past practice and experience rather than the process of subjective selection that MCAH now urges upon us. In consequence, the position now taken by MCAH seems to be inconsistent with that taken by its own employer representatives on the JATC. We should also note that the evidence does not disclose any defect, bias or inadequacy in the evaluation process previously agreed upon and applied over the last several years.

IV

12. The issue for us, though, is not what may appear to make sense from a trade enhancement or commercial point of view, nor is it the construction of the trust agreement, whatever its legal status may be. The question for us is what Article 112 of the *collective agreement* requires, since it is common ground that the so-called *trust agreement* is not incorporated by reference either into the master portion of the agreement or into the Local 67 appendix. Whatever the legal status of the trust agreement may be, it does not provide this Board with a jurisdictional foundation under section 124 of the *Labour Relations Act*. Our jurisdiction is limited to the interpretation of the provincial agreement and its provincially-authorized local appendices. But the collective agreement does not address or specify the standards which the JATC is to apply, it does not contemplate the possibility that the union or employers may disagree with the decisions of the JATC, and it provides no mechanism for resolving disputes among JATC members - even though the specified process of "co-determination" inevitably involves the possibility of deadlock.

V

13. Article 112 constitutes the JATC as a "bipartisan" body charged with the responsibility of ensuring that the industry has an adequate supply of properly-trained apprentices in accordance with locally-administered admission standards. The JATC has done that. On the evidence before us, we cannot conclude that the JATC has not properly fulfilled its responsibility to screen and approve the admission of an adequate supply of tradesmen to the local contractors in Hamilton. According to Mr. Nolan, there have been no productivity problems, and, on the evidence, there is no indication that the contractors have not been able to employ apprentices in accordance with the permitted ratio set out in Article 112.7 of the agreement. There is evidence of their desire to hire more first-year apprentices while there are still apprentices unemployed, but that is expressly prohibited by Articles 112.3 and 112.5 of the agreement, so it deserves no further comment. What is missing from this case is any real indication of a trade problem other than Mr. Nolan's assertion that the contractors wish to inject more "subjectivity" (on the part of the employers rather than the JATC) into the process of approving available apprentices. However, those wishes are not reflected in the language of Article 112 of the agreement which does not regulate the internal workings of the JATC and certainly does not mandate the selection process which the MCAH urges upon us, and which, it says, must be adopted or Local 67 will be in breach of its contractual obligations.

14. Had we been persuaded that the JATC has not assured an adequate supply of properly-trained apprentices in accordance with its contractual mandate under Article 112.1 of the agreement, the employer's case might well have been on a firmer legal foundation; however, on the evidence before us, we cannot conclude that that is the case. It is clear that the JATC has carried out that mandate, and has applied standards which, insofar as possible, avoid considerations of favouritism, nepotism, subjectivity or personal preference. And the result has been an intake of qualified

apprentices which (on the evidence before us, at least) has met the industry's needs. Further, we are constrained to note that, apart altogether from the workings of the JATC, and the number or qualifications of the apprentices which the JATC approves from time to time, Article 112.1 also contemplates a second requirement: a referral slip which is, in itself, an additional condition precedent for any approved apprentice commencing work. To this extent, Article 112 itself contemplates an implicit trade union veto, because, apart altogether from the JATC's verification of an individual's qualifications, there is an additional requirement of a work referral slip from Local 67, indicating its willingness to expand its membership - although, in practice, the trade union has not previously denied membership to apprentices duly approved by the JATC. There is nothing in Article 112 which prevents a trade union limiting its membership in ways which will ensure that members are fully employed or that new apprentices will complete their training within a reasonable period of time - particularly where, as here, the union, and even the JATC proposed a system of admitting the "most" as opposed to the "minimally" qualified candidates. In our view there is nothing in Article 112 which gives specific content to the terms "administration of local apprenticeship standards" or forecloses a system in which only the best candidates are admitted.

15. The question before us, then, is whether the JATC's present position of admitting only the most qualified candidates in accordance with the JATC's past practice and best estimate of industry requirements, and affirmed (albeit by a majority) as late as a month before the filing of this grievance, can be said to constitute a breach of the collective agreement on the part of Local 67. We do not think so. Article 112 does not, on its face, govern the internal workings of the JATC and the established policy of admitting only the most qualified candidates is not inconsistent with the spirit, intent, or language of Article 112. We find no foundation in the language of the agreement for the employers' present assertion that the JATC is obligated to recommend all potential applicants who demonstrate minimum qualifications for entry into the trade, nor, we repeat, is there any requirement that such individuals be issued a work referral slip which, on the language of the agreement is a necessary work requirement controlled by the trade union in any event.

16. The agreement does require the JATC to "assure the industry of an adequate supply of properly trained and qualified mechanics". But, on the evidence before us, it has met that obligation. If there are issues between the parties which are not amenable to resolution under the terms of their collective agreement, as presently drafted, those matters must be resolved through direct negotiations or by some kind of third-party mechanism for resolving disputes of the kind contemplated by the trust agreement which MCAH now rejects.

17. For the foregoing reasons, this application is dismissed.

3520-87-M Labourers' International Union of North America, Local 493 and Sudbury Mine, Mill & Smelter Workers' Union, Local No. 598, Applicants v. Noramco Mining Corporation, Respondent

Right of Access - Union given access to bunkhouse area notwithstanding the fact that it was located within a secured portion of the employer's property on which the gold mine was located

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *D. A. MacDonald* and *E. G. Theobald*.

APPEARANCES: *David Strang* and *Denis LaRocque* for the applicants; *John Little* and *Steve Mlot* for the respondent.

DECISION OF THE BOARD; April 28, 1988

1. The name of the respondent is amended to read: "Noramco Mining Corporation".
2. This is an application under section 11 of the *Labour Relations Act* for a direction from the Board allowing representatives of the applicants access to the property of the employer on which the employees reside. Such access is for the purpose of attempting to persuade the employees to join a trade union.
3. In its reply the respondent indicated its objection to the Board granting such direction. It was the position of the respondent that the employees did not "reside" on the property of the employer, or on property to which the employer has the right to control access. In its reply, and at the hearing, the respondent further indicated that if the employees did "reside" on the employer's property, it disputed that this was an appropriate case for a direction. The respondent further desired to make representations with respect to the manner in which access ought to be exercised if the Board deemed it appropriate to make a direction.

4. On April 21, 1988, the Board gave the following oral decision:

The Board has carefully considered the able submissions of both counsel. In light of the agreed-upon facts of this case, the Board finds that the applicant has met the criteria set out in section 11. The Board however has a discretion to deny access even where the section 11 criteria have been established. In the circumstances of this case, the Board is not persuaded that the direction for access ought not to be granted. This case is not so unusual as to persuade the Board to exercise its discretion to deny access. In light of the language and purpose of section 11, this is an appropriate case to direct the employer to allow access to representatives of the trade unions.

5. After giving its oral decision, the Board heard certain submissions with respect to the manner in which access ought to be exercised. The parties were able to reach agreement on certain matters relating to the manner of access but were unable to reach agreement on the scope of the direction allowing access and upon the duration of the direction granting access. In respect of the scope of the direction, it was the applicants' position that representatives of the trade union should be allowed access to the camp portion of the employer's property. Included in the area to which the applicants sought access is the recreation and lunch hall and areas which are colloquially referred to as the "bunkhouse" areas. The latter areas consist of a group of cabins and ATCO trailers. Counsel for the respondent on the other hand submitted that access ought to be restricted

to an office which is adjacent to the security office situated near the gate which controls access to the mine and mill areas on the property. In the alternative, counsel submitted that if access beyond this office was directed by the Board, access should nevertheless be restricted to only one of the two bunkhouse areas and to the recreation and lunch hall area which is frequented by all employees. Counsel argued that for security reasons, access should not be granted to the other bunkhouse area which is located in the gate-enclosed security area upon which the gold mine and mill itself are also situated.

6. In respect of the duration of the direction, counsel for the applicants submitted that the direction remain in effect until the terminal date fixed for any application for certification by the applicants with respect to employees of the respondent residing at the property. Counsel for the respondent submitted that the direction ought to expire after two weeks.

7. Having regard to the agreement of the parties, the Board directs as follows:

- a) Before entering the property, representatives of the applicants will give notice to Mike Murak or his designate on or before the business day prior to the day on which access is desired.
- b) There shall be no solicitation of an employee during the employee's working hours.
- c) Representatives of the applicants will obey normal camp rules and regulations and will check in at security when they arrive.
- d) Access will be exercised by Bill Suppa, Denis LaRocque, Rolly Tessier and Rick Grimard or their designate provided that such designation is made in writing.
- e) There will be no more than two (2) such representatives from each of the two (2) applicant unions on site at any one time. The parties are agreed that there will not be more than four (4) representatives on site at one any time.
- f) The hours of access shall be from 2:00 p.m. to 10:00 p.m.

8. In addition and after having heard and considered the submissions of the parties, the Board directs as follows:

- g) Access to the respondent's property pursuant to this direction refers to access to those areas where employees reside, including the bunkhouse areas and the recreation and lunch hall area.
- h) The right of access directed herein shall expire on April 21, 1989 or on the terminal date fixed for any application for certification by the applicants with respect to employees of the respondent residing at the property in question, whichever should first occur.
- i) Access on the above terms will commence forthwith.

9. The parties have indicated that they do not require written reasons of the Board. We feel that it is appropriate to provide written reasons consistent with our oral decision at the hearing with respect to paragraph 8(g). As acknowledged by counsel for the applicants, access to the bunk-

house areas does not entitle representatives of the applicants unlimited or unfettered access to that area. As was stated in *Ledcore Industries Limited*, [1987] OLRB Rep. Nov. 1399:

10. A section 11 direction interferes with an employer's right to restrict access to property over which the employer has control. Subject to the terms of the direction, the employer is prevented from denying access to the union's representative. Employees, however, are not prevented from denying access to their private rooms. They are not obliged to speak with the union representative. They are not obliged to go to any meeting. *Union representatives are simply put in the same position as any resident employee, so that opportunities for communication are not limited by the assertion of employer property rights any more than would be the opportunities for communication between resident employees....*

[emphasis added]

10. In *Madeleine Mines Ltd.*, [1987] OLRB Rep. Dec. 1574, the issue of access to bunkhouses was addressed by the Board. At paragraph 9 of the decision, the Board stated:

9. The property to which section 11 contemplates a direction granting access is the property on which employees "reside". While this "employee residence" characteristic may not attach to all of the property owned or controlled by the employer, it must surely attach most strongly to the bunkhouse. That is, therefore, the part of the property to which the Board is least likely to restrict access. We certainly would not do so unless there were a compelling reason. The mere possibility of violence is not a compelling reason.

The decision of the Board in *Madeleine Mines* commends itself to this Board.

11. In this case, the respondent acknowledged that resident employees have access to each of the two bunkhouse areas notwithstanding the fact that one of these bunkhouse areas is located within the "secured" portion of the employer's property on which the mine and mill are located. Employees who reside in one bunkhouse area are not precluded from visiting employees residing in the other bunkhouse area. In those circumstances, the Board cannot find any compelling reason to restrict access to an area where employees normally reside.

0801-87-G Ontario Allied Construction Trades and Labourers' International Union of North America, Local 1059, Applicants v. Ontario Hydro and Electrical Power Systems Construction Association, Respondents

Construction Industry - Construction Industry Grievance - Reconsideration - Request to reconsider decision dismissing grievance - Board having jurisdiction to reconsider decision pursuant to s.124 - Board exercising discretion to not reconsider the decision

BEFORE: Harry Freedman, Vice-Chair, and Board Members R. R. Montague and W. H. Wightman.

APPEARANCES: David Strang, Richard Rock and J. Marchildon for the applicants; M. Patrick Moran, Sheila Goldsworthy and John Tomlinson for the respondents.

DECISION OF THE BOARD; March 18, 1988

The Board gave the following oral decision at its hearing in this matter on March 17, 1988:

The applicants seek reconsideration of a decision of the Board (differently constituted) dated September 30, 1987 on the grounds that that original decision dismissing the applicants' grievance was manifestly unreasonable. Counsel for the applicants contended that the reasons for that decision patently demonstrate that the Board did not address the issue that was submitted to it for arbitration but rather purported to decide some other issue.

Counsel for the respondents submitted that as this was an arbitration proceeding under section 124 of the *Labour Relations Act*, the Board did not have the jurisdiction to reconsider its decision and, in any event, the Board's original decision of September 30, 1987, while not finding in favour of the applicants, did deal with the issue that was submitted.

Counsel for the respondents argued that section 124 of the Act creates an entire procedure for dealing with arbitration under the collective agreement. Section 106 of the Act is not referred to in section 124. Section 124(1) expressly provides that the Board's determinations under that section are final and binding without reference to any power to reconsider. Counsel further submitted that as a policy matter, arbitrations, particularly in the construction industry, must be dealt with quickly. Reconsideration of decisions made pursuant to section 124 would prolong the process and detract from the finality of the proceedings. Counsel also pointed out that construction industry grievances may be dealt with under sections 44, 45, under collective agreements, or under section 124. If the matter proceeded under any process other than section 124, there would be no power to reconsider. Thus, as a policy matter, the legislation ought to be interpreted so as to prevent "procedure shopping", as counsel put it, and therefore we should find that the Board cannot reconsider the decision in this matter.

Counsel for the applicants referred to *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096, in which the Board wrote at paragraph 4:

"The respondent argued that the Board, when sitting as an arbitrator, was *functus officio* when it rendered its decision in this matter in the first instance. The respondent contends, therefore, that the Board is without jurisdiction to reconsider its decision, i.e., the discretionary authority available to the Board in section 95(1) [now section 106(1)] of the Act is not available to it in these circumstances. The Board cannot agree with this contention. While the Supreme Court of Ontario (Divisional Court) in its decision in *Master Insulators Association of Ontario, Incorporated*, July 18, 1979 (as yet unreported), did find that the Board, when proceeding under section 112a [now section 124] of *The Labour Relations Act*, was an arbitrator and thus excluded from Part I of *The Statutory Powers Procedure Act, 1971*, S.O. 1971, c. 47, it suggested that the Board could exercise its other powers under the Act in section 112a. This decision, in the Board's view, does not restrict it in any way from exercising the powers given to the Board under *The Labour Relations Act*, including the powers given to it by sections 92 [now section 103] and 95. Therefore the Board in this case has the authority to decide whether it should reconsider its decision."

Counsel for the respondents distinguished the *John Entwistle Construction Limited* decision on the basis that it was dealing with the extent of bargaining rights while this case was strictly a matter of contract interpretation. He

relied on *Master Insulators Association of Ontario Incorporated*, (1979) 25 O.R. (2d) 8 (Div. Ct.) to support his argument that the Board was acting in a distinct capacity under section 124, and as a board of arbitration was not subject to the *Statutory Powers Procedure Act*. Counsel relied on that decision to suggest that the Board, when acting as an arbitration board, should be treated the same way as any other arbitration board under the *Labour Relations Act*, and therefore not have the power to reconsider its decisions.

In *Ontario Erectors Association and Sheaffer Townsend Limited v. International Union of Operating Engineers, Local 793*, unreported, February 19, 1980 (Ont. Div. Ct.), the Court determined that the provisions of section 108 applied to the Board in a proceeding under section 124. In that case the Court wrote at pages 5-6:

"Normally, the Ontario Labour Relations Board is largely protected from judicial review by section 97 [now section 108] of the Act which effectively limits review to matters of strict jurisdiction or breaches of natural justice. It is submitted by the applicant that section 97, known popularly as the privative clause, does not apply to the Board *qua* Arbitrators. The short answer to that submission, and the only one it is necessary for us to examine, is that section 97 on its face protects any decision, order, direction, declaration or ruling made by the Board. Had the Legislature intended a decision made by the Board *qua* Arbitrators to be excepted, it could easily have said so and it did not. Our powers of correction therefore are limited to errors of jurisdiction and we find none."

That result was consistent with the approach taken earlier by the Divisional Court in *Master Insulators Association of Ontario*, *supra*, where it wrote at page 13:

"In my view, the Board, in fulfilling its duties under s. 112a [now section 124], sits as an arbitrator and gives its decision as an arbitrator, although in doing so the number of persons sitting and the procedure respecting majority decisions and minority decisions, for example, will be governed by the statutory provisions governing the Board's conduct of its affairs and the Board's normal practice."

Section 106(1) of the Act provides:

"The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling."

In our opinion, the Board has the authority under that section to exercise the powers set out therein in any proceeding, including proceedings arising under section 124 of the Act. We believe that the Board's statement in *John Entwistle Construction Limited*, *supra*, was correct and is also consistent with both the express words of the Act and the relevant judicial authority.

We note here that the respondents took no objection whatever to a differently constituted panel hearing the reconsideration request. Thus, we do not address ourselves to whether one panel of the Board can reconsider another panel's decision. We have assumed, without deciding, that we do have that authority.

As to the merits of the request for reconsideration, reconsideration is not an appeal. Indeed, the very compelling policy argument made by counsel for the respondents about our jurisdiction has a great deal of merit with respect to the exercise of our discretion to reconsider decisions made under section 124 of the Act.

Counsel for the applicants argued that the Board's decision on the interpretation of the collective agreement was patently unreasonable and did not address the issue raised in the grievance.

It is clear to us that the Board was required to determine whether the respondents acted contrary to Article 3 of the Foreman Appendix to the relevant collective agreement when it placed a foreman on a construction job. The Board found that the facts before it rendered the provisions of Article 3 inapplicable. That was the position argued by counsel for the respondents at the original hearing.

In our view, reconsideration of a Board decision, particularly in a proceeding under section 124 is not a forum for correcting what may or may not be an incorrect interpretation of a collective agreement or assessment of the evidence before it. If the reasons for decision do not patently demonstrate that the Board has placed an unreasonable interpretation on the collective agreement, the Board ought not to exercise its discretion to reconsider the decision.

In this case, we are satisfied that the Board considered the arguments made by counsel and chose to find that the respondents' approach to the issue of the application of section 3 of the Foreman Appendix to the collective agreement on the facts before it was preferable. We are not satisfied that that decision ought to be reconsidered.

Therefore, the applicants' request for reconsideration is hereby denied.

3528-87-R United Steelworkers of America, Applicant v. Screen Print Display Advertising Limited, Respondent

Certification - Practice and Procedure - Pre-Hearing Vote - Applicant and incumbent requesting copies of the lists of employees filed by the employer - Voters list agreed on by parties at meeting with officer - Copy of the voters list to be given to applicant and incumbent

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

DECISION OF THE BOARD; April 21, 1988

1. The title of this proceeding is amended to describe the respondent as: "Screen Print Display Advertising Limited".

2. This is an application for certification.
3. The applicant has requested that a pre-hearing representation vote be taken.
4. The respondent and the Employee's Association of Screen Print Display Advertising Limited ("the incumbent") are parties to a collective agreement ("the collective agreement") covering the following bargaining unit ("the incumbent's unit"):

All of [the respondent's] employees described in the wage schedule of [the collective agreement dated May 1, 1986 between the respondent and The Employee's Association of Screen Print Display Advertising Limited] at its plants in the City of Brantford, save and except foremen/women, persons above the rank of foremen/women, office, creative and sales staff, security guards, part time employees, which are defined as employees whose term of employment is not expected to exceed three months and students employed during the school vacation period.

That will be the voting constituency for the purpose of the pre-hearing representation vote hereafter directed. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in that voting constituency were members of the applicant on March 25, 1988, which is the date this application was made.

5. We hereby direct that a pre-hearing representation vote be conducted in the aforesaid voting constituency. All those employed in the voting constituency on April 13, 1988 who are so employed on the date the vote is taken will be eligible to vote. Voters will be asked to indicate whether they wish to be represented by the applicant or the incumbent in their employment relations with the respondent.

6. The matter of the conduct of the vote is referred to the Registrar pursuant to section 68 of the Board's Rules of Procedure.

7. The Labour Relations Officer who met with the parties in connection with this application records in his report an agreement of the parties that the appropriate bargaining unit should be described as follows:

All employees of the respondent described in the wage schedule of the agreement in the City of Brantford save and except forepersons, persons above the rank of foreperson, office, creative and sales staff, security guards, persons regularly employed for not more than 24 hours a week and students employed during the school vacation period.

It also appears the parties agree that none of the respondent's employees who fell within the incumbent's unit on either March 25 or April 13, 1987, would have been excluded from the proposed bargaining unit on either date and that none of the employees excluded from the incumbent's unit on those dates would have been included in the proposed unit on either date. Notwithstanding those facts, if the applicant were to be certified in this application for a unit described as the parties propose, it appears the incumbent would continue to have bargaining rights for a unit (however empty and however likely to remain so) of employees regularly employed for not more than 24 hours a week, save and except employees whose term of employment is not expected to exceed three months and others presently excluded from the incumbent's unit. It is not our function to determine the appropriate bargaining unit at this stage. That is dealt with, if at all, after the

vote is conducted. Against the possibility that the panel which deals with that issue may then be concerned with the differences in scope between the incumbent's unit and the proposed unit, the parties should address this point in the submissions they file after the vote is conducted.

8. The Labour Relations Officer's report notes requests by the applicant and incumbent that they be given copies of the lists of employees filed by the employer. The request is opposed by the respondent.

9. The lists in question were reviewed by the applicant and incumbent at the parties' meeting with the Labour Relations Officer. They were able to agree with the respondent about which of those persons listed were employed in the voting constituency (and the proposed unit) on the application date for the purpose of the count. They also agreed on a voters list setting out those who were employed in the voting constituency on April 13, 1988. The later list consists of copies of those portions of the originally-filed portions of the lists (Schedules A, C and D) which contain names of eligible voters, with the names of those not eligible crossed out in such a way that those names can still be read. In accordance with the Board's usual practice, copies of that voters list will be posted in the workplace beside the Board's Notices of Taking of Vote in advance of the conduct of the vote we have directed.

10. We can see no reason why the applicant and incumbent should not each be given a copy of the voters list which will be posted in the workplace. This has the effect of giving them all but Schedule B of the lists filed by the employer. We can see no reason to now provide them with copies of Schedule B, since the applicant and incumbent have agreed, having seen it, that no one named in Schedule B fell within the voting constituency or the appropriate bargaining unit at any relevant time. Copies of the voters list will therefore be sent to the applicant and incumbent together with this decision.

0896-86-M The Windsor Star, Applicant v. Windsor Newspaper Guild Local 239, Respondent

Employee Reference - Practice and Procedure - Application filed during currency of collective agreement - Whether inquiry should be restricted to changes in duties and responsibilities - Section 106(2) jurisprudence analyzed - Board's "changes" policy abandoned - Full duties and responsibilities examination to be conducted in all cases - Board outlining what must be contained in a section 106(2) application - Person in question held to exercise managerial functions

BEFORE: *S. A. Tacon, Vice-Chair, and Board Members D. A. MacDonald and M. Jones.*

APPEARANCES: *Leonard P. Kavanaugh, Carl Morgan and Art Kainz for the applicant; Stephen Krashinsky, Dave Hall, Mary MacKay-Black and Denise Chuk for the respondent.*

DECISION OF S. A. TACON, VICE-CHAIR, AND BOARD MEMBER D. A. MACDONALD; April 26, 1988

1. These are the reasons for the Board decision issued February 26, 1988. By letter dated September 2, 1986, a Board Officer was appointed pursuant to an application under 106(2) of the *Labour Relations Act* in which the applicant employer was seeking a determination as to whether

Mary Jane Handy, classified as librarian, is an employee within the meaning of the Act. The applicant asserts that Handy is not an employee by virtue of section 1(3)(b) of the Act; the respondent trade union disputes that assertion.

2. Examinations of Handy and witnesses called by the applicant and respondent were conducted and a number of exhibits filed. Subsequently, a hearing was convened at the parties' request at which counsel made extensive submissions. In the Board's view, it is appropriate to first set out those able and thorough submissions in a highly abbreviated form.

3. Counsel for the applicant reviewed the evidence in considerable detail in support of his position that Handy exercised managerial functions within the meaning of section 1(3)(b) of the Act. Counsel also asserted that the language of section 106(2) of the Act required the Board to undertake a full review of the duties and responsibilities of the individual in dispute. That is, counsel argued that the Board practice of restricting its inquiry in certain circumstances to "changes" in those duties and responsibilities was not permitted under the Act. Further, it was contended that the relevant date as of which the duties and responsibilities should be ascertained was not the application date but the conclusion of the section 106(2) inquiry or, in the alternative, the conclusion (or in the further alternative, the commencement) of the examination of the individual who is the subject of the inquiry. With respect to the relevant date, counsel submitted that the question of the "employee" status should be determined on the basis of the most current assessment of the persons duties and responsibilities possible, i.e., the inquiry should not be limited to the application date. Cases referred to in support included: *Ontario Hydro*, [1981] OLRB Rep. July 931; *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121; *The Thunder Bay Public Library Board*, [1974] OLRB Rep. Oct. 727; *York University*, [1975] OLRB Rep. Dec. 945.

4. Counsel for the respondent trade union argued that, as in certification applications, the appropriate point at which to assess the individual's duties and responsibilities was the application date. That cut-off date permitted the crystallization of the issues and evidence at a known point in time and prevented abuse by an employer who, otherwise, would be free to shape those duties and responsibilities in its self-interest. Counsel supported the Board policy of restricting its inquiry to "changes" in duties and responsibilities. It was further asserted that, once a person's status had been determined by the parties, the issue was always one of "changes", that is, the applicant bore a substantial onus to show that the circumstances had changed sufficiently to warrant a different conclusion as to employee status. Counsel did suggest that a different test might apply if the applicant was a trade union as the applicant would merely be responding to a situation created by the employer who controlled the work assignments. Counsel also reviewed the evidence in detail in support of his assertion that Handy was an employee within the meaning of the Act and, in this regard, stressed the distinction between "professional" and "managerial" responsibilities. Finally, counsel argued that, in contrast to section 1(3)(b) issues in a certification application, a higher standard existed for exclusion under section 1(3)(b) once the person had previously been agreed to have employee status, as the collective bargaining history favoured retention of the status quo in the interests of labour relations stability. Cases referred to included: *Ontario Hydro*, *supra*; *Westmount Hospital*, [1980] OLRB Rep. Oct. 1572; *The Corporation of the City of Thunder Bay*, *supra*; *Vagden Mills Limited*, [1982] OLRB Rep. June 968; *Belleville General Hospital*, [1975] OLRB Rep. June 487; *The Beacon Herald of Stratford Limited*, [1975] OLRB Rep. Feb. 103; *The Thunder Bay Public Library Board*, *supra*; *East York Public Library Board*, [1971] OLRB Rep. Mar. 120; *Macleans Magazine*, [1983] OLRB Rep. Mar. 401; *The Royal Ontario Museum*, [1985] OLRB Rep. Feb. 325; *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84.

5. In reply, counsel for the applicant stressed that the statutory duty imposed by section 106(2) did not admit of the "changes" policy of the Board. Rather, it was submitted that section

106(2) recognized the fluidity of labour relations, including the status of persons involved in a collective bargaining relationship. This dynamic aspect should be particularly recognized where the parties, as here, are coming out of their first collective agreement which served as a "shaking out" period in the relationship. That is, the initial agreements should not be so immune from alteration. Counsel also pointed out that the Board policy enunciated in *Westmount, supra*, distinguished between issues arising during the currency of the collective agreement and, as here, in negotiations for a contract renewal. Counsel discounted the potential for abuse by employers seeking to "shape" an individual's duties and responsibilities and disagreed that a different standard for exclusion pursuant to section 1(3)(b) should be applied where the trade union was the applicant under section 106(2).

6. Before dealing with the factual findings and assessment of the duties and responsibilities of Handy, the Board must respond to the issue of the scope of the duties and responsibilities examination and the relevant date as of which those duties and responsibilities must be reviewed. Indeed, the question as to the scope of examination itself has two aspects, namely, the Board's "changes" policy and the fact that the Board's endorsement of the instant application was restricted to "changes". The Board intends to consider the latter aspect first.

7. As noted, the Board's endorsement of September 2, 1986, appointing a Board Officer was restricted to an examination of "changes" in the duties and responsibilities of Handy. There was no dispute that, on the information *then* before the Board, the examination would fall within that period when the Board policy would restrict the inquiry to "changes", that is, the application appeared to have been filed during the currency of a collective agreement. It is not disputed that the applicant raised the issue of the proper scope of the examination at the commencement of the inquiry before the Board Officer and that a full duties and responsibilities examination was conducted, subject to the respondent's right to argue before the Board that only changes in those duties and responsibilities should be considered. It is also not disputed that the employer had raised the question of Handy's "employee" status during negotiations for the renewal of the collective agreement and had withdrawn her proposed exclusion from the bargaining unit without prejudice to its right to bring an application under section 106(2). Had that fact been communicated to the Board at the time of the original application under section 106(2) of the Act, the usual application of Board policy would have resulted in a Board order for a full duties and responsibilities inquiry. Counsel for the respondent acknowledged that his argument to restrict the inquiry to "changes" on the ground that the original endorsement was so restricted was technical. The Board agrees with that characterization and sees no basis for restricting the inquiry to "changes" on this ground alone. Clearly, had the Board known the status question had been raised in negotiations, the endorsement would have directed a full inquiry. The applicant properly raised the matter before the examination commenced, the respondent suffered no prejudice and, accordingly, this argument for limiting the inquiry to changes fails.

8. The Board must next deal with the Board policy regarding the scope of the duties and responsibilities examination. In short, the applicant asserted such examinations could never be restricted to "changes" given the language of section 106(2), whereas the respondent contended that such examinations should always be restricted to "changes". Both parties submitted the current Board policy was inappropriate, as a matter of statutory interpretation or labour relations considerations.

9. Prior to the decision in *Westmount, supra*, in 1980, the thrust of the jurisprudence was to the effect that a party which had agreed at some point on the status of an individual should not be permitted to challenge or litigate that status through a section 106(2) application unless a "substantial" or "material" change in those duties and responsibilities had occurred: *Davis Lumber Co.*

Limited, (1959), 59 CLLC ¶18,184; *City of London*, [1967] OLRB Rep. Nov. 791; *Hydro-Electric Power Commission of Ontario*, [1970] OLRB Rep. Jan. 1246; *City of St. Catharines*, [1966] OLRB Rep. July 270; *Oshawa Public Library Board*, [1967] OLRB Rep. Nov. 793; *Peel Memorial Hospital*, [1968] OLRB Rep. May 216. That jurisprudence was not entirely rigid, however. Applications under section 106(2) were considered "timely" and not restricted to "changes" in duties and responsibilities where the question of an individual's status had been raised during negotiations for a renewal of the collective agreement and, if not settled in those negotiations, the applicant party had expressly reserved its right to bring a section 106(2) application: *F. J. Davey Home for the Aged (Algoma)*, [1974] OLRB Rep. Aug. 558; *Belleville General Hospital*, [1975] OLRB Rep. June 487.

10. *Westmount, supra*, summarized the more liberalized approach to section 106(2) applications. As that decision generally has been cited in subsequent decisions, it is useful to set out the relevant passage from *Westmount*:

4. The parties, however, are currently bound by the collective agreement entered into on May 12, 1980. Where parties have by virtue of their collective agreement or other form of agreement settled upon the employment status of a person, the Board at one time refused to let either party at any time withdraw unilaterally from that agreement by means of an application under section 95(2) of the Act. (See, for example, *Belleville General Hospital*, [1975] OLRB Rep. June 487). The basis for this policy is that a party having entered into an agreement on the status of a particular person, cannot, in the absence of a material change in duties and responsibilities, come before the Board and claim that a "question" exists as to the status of that person. More recently, the Board has liberalized this policy so as to permit an application to be brought during negotiations for the renewal of a collective agreement, after the collective agreement has expired. Parties therefore are no longer bound indefinitely to the terms of an initial agreement. The Board will not however, permit an application (other than one relating to *changes* in the duties and responsibilities) to be brought during the first set of negotiations following agreement upon the status of the person in question (*Collingwood General Marine Hospital*, [1975] OLRB Rep. Jan. 18). Nor will it permit a full application to be brought during the term of a collective agreement, unless it is satisfied either that the position is a new one arising during the term of the collective agreement, or that the applicant prior to entering into the collective agreement expressly reserved its right to bring a subsequent section 95(2) application on the person in dispute. Otherwise the applicant will be taken to have acquiesced in the position of the other party, and to have accepted it at least for the term of that collective agreement. The Board upon receipt of an application under section 95(2) during the term of a collective agreement therefore automatically limits the appointment of a Board Officer in inquiring into *changes* in the duties and responsibilities since the date the agreement was entered into (e.g. *Ontario Hydro*, [1975] OLRB Rep. July 560). If the applicant feels that the appointment should not be limited to "changes", it may write to the Board setting out its reasons, and the Board may hold a hearing to deal with the proper terms of the appointment.

11. The determination of the scope of the duties and responsibilities examination is now relatively complex and may be summarized as follows. In respect of applications during the term of the collective agreement, the examinations will be restricted to "changes" since the commencement of the collective agreement unless the position is a new one or unless the applicant raised the matter in negotiations and, during those negotiations, reserved its right to bring a section 106(2) application if the matter was not settled in bargaining. In these instances, the examination will not be so restricted. In respect of applications during the "open" period, i.e., during negotiations for a renewal of the collective agreement, a full duties and responsibilities examination generally will be directed. An examination, however, will also be restricted to "changes" in respect of applications brought during the first set of negotiations following the parties' agreement as to the status of the individuals now in dispute. As noted, subsequent cases have followed the policy enunciated in *Westmount*: *Owen Sound Public Utilities Commission*, [1981] OLRB Rep. Nov. 1607; *St. Joseph's General Hospital*, [1981] OLRB Rep. Nov. 1638; *The Wellesley Hospital*, [1981] OLRB Rep. Dec.

1843; *Cochrane Temiskaming Resource Centre*, [1983] OLRB Rep. Feb. 222; *The Corporation of the City of Brockville*, [1982] OLRB Rep. May 655; *Pathe Video Inc.*, [1984] OLRB Rep. Aug. 1123; *St. Mary's General Hospital (Kitchener)*, [1986] OLRB Rep. Apr. 564.

12. Throughout the development of the jurisprudence, the Board has grappled with the issues of the extent to which a status determination is or should be binding for the future and of what constitutes a determination. In effect, the Board utilized estoppel principles to restrict subsequent litigation of an individual's status. Parties were not permitted to resile from their agreements as to the status of an individual. The jurisprudence subsequently relaxed the application of the estoppel principles to permit unrestricted examinations in certain time periods. In consequence, however, the "restricted" or "full" examination has become an increasingly artificial distinction, dependent, in most circumstances, upon the timing of the application as within or outside the "open" period for collective bargaining or upon subtle assessments as to whether the right to apply under section 106(2) was "expressly reserved" during the last round of negotiations. An "express reservation" is not readily determined in the context of bargaining by persons without legal training and whose focus at that point in time is the settlement of a collective agreement.

13. In the Board's view, based on its experience with section 106(2) applications since *Westmount, supra*, it is preferable to abandon that artificiality and appoint a Board Officer to conduct a full duties and responsibilities examination where the Board is satisfied that a "question" has arisen as to the status of an individual. The statutory language permits a section 106(2) application during negotiations and during the currency of a collective agreement and appears to make no distinction between those time periods with respect to the treatment of an application. The section itself reads:

(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

The "employee" or "guard" status of an individual is clearly a matter exclusively to be determined by the Board. The Board should not deprive itself from hearing evidence as to the mischief against which section 1(3)(b) or section 12 is directed simply because the timing of the application does not fit within an artificial category leading to a "full" duties and responsibilities examination. The parties are not to be deprived, through recourse to an equitable principle, from coming to the Board for an adjudication on the merits in respect of a matter specifically and exclusively within the Board's statutory authority.

14. Therefore, the Board will no longer restrict the evidence to be adduced before a Board Officer with respect to the duties and responsibilities of the person(s) in dispute to "changes" in those duties and responsibilities, as in the past. Section 106(2) applications commonly are initiated through an often sparse letter to the Board merely naming the individual(s) in dispute. Henceforth, the applicant must, in addition, indicate the basis for the application, i.e., the nature of the position, including duties and responsibilities (to the extent known, where the applicant is a trade union), the historical dimension to the position (if any) including any Board determinations and parties' agreements and how the mischief against which sections 1(3)(b) or 12 are directed has arisen or has ceased. The respondent must outline fully any grounds it asserts as to why the Board should not entertain evidence as to the duties and responsibilities of the person(s) in dispute. The Board must be satisfied a "question" has arisen as to the "employee" or "guard" status of the individual(s) in dispute before a duties and responsibilities examination will be directed. Where the individual's status has not been previously determined by the Board in a certification or earlier 106(2) application or by specific agreement of the parties, an examination will generally be

directed. Where the Board has previously determined the status of a person in a certification application or prior section 106(2) application or where the parties have reached a specific agreement as to the person's status, the Board will not permit evidence as to the person's duties and responsibilities to be adduced before a Board Officer unless the Board is satisfied, on the face of the application, that it appears the mischief against which section 1(3)(b) or section 12 is directed has arisen or has ceased. Where the Board is not so satisfied, the application may be dismissed without a hearing. In the Board's opinion, this policy does not undermine agreements of the parties as to a person's status and avoids repeated or frivolous examinations, yet provide sufficient flexibility to adequately respond to circumstances where the mischief against which sections 1(3)(b) and 12 are directed has arisen or has ceased.

15. The question of "changes" in duties and responsibilities moves from a vehicle for initially and artificially classifying the type of examination to an evidentiary matter. That is, the *status quo* and the duties and responsibilities of the disputed individual, including any changes thereto, become matters of evidence and appropriate weight in the circumstances of each case. This historical dimension, the placing of "changes" in its historical context, is currently a theme in the Board's jurisprudence dealing with section 106(2) applications: *Corporation of the City of Thunder Bay, supra*; *Vagden Mills*, [1982] OLRB Rep. June 968; *Kingston General Hospital*, [1983] OLRB Rep. Apr. 551. It is useful to refer to the following passage from the *Corporation of the City of Thunder Bay, supra*:

6. ...Furthermore, (and in addition to the usual rule that "he who asserts must prove"), a party seeking to alter a *status quo* which had been settled and embodied in a series of collective agreements, must be able to provide a firm evidentiary foundation for its new position. The Board in *Windsor Transit*, [1979] OLRB Rep. Mar. 262 put it this way:

Counsel argued that the respondent had included the disputed classifications in the bargaining unit for more than 15 years, and should be estopped from now claiming that these employees are managerial. There is considerable merit in this argument. Where, over an extended period of time, an employee has been included in a bargaining unit and has not been treated as "managerial", there is a natural inference that he has not been exercising managerial functions and is, therefore, an "employee" within the meaning of the Act. As evidentiary onus rests upon any party who seeks to establish the contrary. Generally, the Board will require evidence of a change in duties and responsibilities before the Board will alter the previously agreed upon status quo. At the same time, the Board recognizes that section 95 relief is not restricted to situations in which parties are negotiating their first collective agreement. Organizations and systems of management can change. Over time the degree and focus of decision-making power can be altered.

Nevertheless, if a person has been included in a bargaining unit for some years, there has not been a significant alteration of his duties and responsibilities, and there is little concrete evidence of the kind of "mischief" to which section 1(3)(b) is directed, it is unlikely that this Board will conclude that the individual exercises managerial functions and must now be excluded from the unit. An employer's organizational scheme has a historical dimension which must be considered when the evidence is being weighed.

and from *Vagden Mills, supra*:

12. Had the situation of Ms. MacLellan been viewed afresh or been raised shortly after her promotion to her present position, the Board might well have concluded that, on balance, her supervisory or admonitory functions are purely incidental to her quality control concerns, and are not such as to require her exclusion from the bargaining unit. But it appears that she was always treated as excluded by *both parties*, and in consequence, developed a relationship with her employer (for example, by taking minutes of grievance meetings on behalf of the employer) which associated her with the "management team". This historical dimension cannot be ignored

when deciding close cases; for as the Board observed in *Corporation of the City of Thunder Bay, supra*;

“A party which is attempting to alter a status quo which reflected the earlier perceptions of the parties concerning an individual's status, and which has apparently worked adequately for some years must recognize the importance of this historical dimension, and be prepared to adduce clear evidence as to why a change is required to accommodate the interest section 1(3)(b) was designed to protect.”

We do not think the evidence adduced by the applicant union falls within those parameters and having regard to it in its totality (including the historical dimension wherein the union accepted for many years that the quality control supervisor should be excluded from the bargaining unit,) we are of the opinion that Ms. MacLellan exercises managerial responsibilities within the meaning of section 1(3)(b) of the Act and must therefore be excluded from the applicant union's bargaining unit.

The Board affirms the principles just cited in the context of the Board's new policy in dealing with section 106(2) applications.

16. For the foregoing reasons, then, the Board concludes that the duties and responsibilities examinations of Handy should not be restricted to “changes”.

17. The Board next turns briefly to counsels' submissions as to the effective date as of which those duties and responsibilities should be measured. Briefly, counsel for the applicant asserted the appropriate date would be the conclusion of the section 106(2) inquiry, or, in the alternative, the conclusion (or, in the further alternative, the commencement) of the examination of the individual who was the subject of the inquiry in order to ensure the determination was on the basis of the most current information available. Conversely, counsel for the respondent contended that the application date was the most appropriate to crystallize the issues and, thereby, prevent abuse by the employer seeking to “develop” the duties and responsibilities in its self-interest. In the Board's view, it is not necessary to conclusively resolve that issue in the instant case because the Board's ultimate conclusion on the merits would not be different whether the duties and responsibilities assessment was restricted to the application date or to those dates suggested by applicant's counsel.

18. The Board notes that the new approach does not affect several other aspects of the section 106(2) jurisprudence. Specifically, only a party to the collective agreement or bargaining relationship (the employer or the trade union) may apply under section 106(2); the employees in the bargaining unit do not have standing to seek such a determination: *Central Park Lodges, supra*; *Wallace Barnes Limited*, (1961) 61 CLLC ¶16,198; *Indusmin Limited*, [1975] OLRB Rep. Mar 184; *York University*, [1978] OLRB Rep. Aug. 790. However, either such party may apply under section 106(2) and the application will not be regarded differently depending on the identity of the applicant. Further, the Board assesses the evidence of duties and responsibilities of disputed person(s) only in relation to whether those persons are “guards” or “employees” for purposes of the Act, and not whether they are excluded from or included in the bargaining unit, although, in many instances, the “managerial-employee” status determination will implicitly resolve the latter question as well: *Northern Telecom*, [1983] OLRB Rep. July 1134. It is for arbitration to resolve a dispute concerning solely the bargaining unit status of an individual. The Board, though, does have jurisdiction to determine the identity of the employer in a section 106(2) application where such is in dispute notwithstanding agreement that the persons themselves are employees: *Ontario Hydro, supra*. Finally, the jurisprudence as to the purpose of the section 1(3)(b) or section 12 exclusion and the various indicia of managerial or employee or guard status are affirmed: *The Corporation of the City of Thunder Bay, supra*, and the cases cited therein.

19. The Board now deals with the merits of the application, i.e., whether Handy is an

employee within the meaning of the Act. The applicant asserted that Handy should be excluded as "managerial" by virtue of section 1(3)(b). The jurisprudence dealing with section 1(3)(b) of the Act has been thoroughly canvassed in *J. M. Schneider Inc., supra*. The Board does not regard it as necessary to reiterate that jurisprudence herein but, rather, affirms the principles and considerations expressed in *J. M. Schneider, supra*, and the cases cited therein.

20. The Board, in reaching its findings of fact in the instant case, has reviewed the transcript of the examinations at which the parties were afforded full opportunity to question witnesses and to lead relevant evidence, both documentary and *viva voce*, in support of their respective positions. The Board has weighed and assessed all of that evidence and the documentary material filed. In the Board's view, it is more appropriate to indicate its factual findings at the same time that the facts in the instant case are placed in the context of the jurisprudence, rather than deal with those matters sequentially.

21. The issue the Board must determine is whether Handy should be considered "managerial" within the meaning of section 1(3)(b). In determining that issue, for the reasons noted earlier, the Board must evaluate the full duties and responsibilities of Handy as of the date the Board Officer's inquiry commenced. The Board notes that the focus has been the actual duties and responsibilities rather than title. Specifically, the Board's conclusion is irrespective of whether Handy was viewed or called "chief librarian" or "librarian".

22. Handy, who commenced her job in January 1984, is responsible for the day-to-day operation of the library and for assessing, recommending and implementing a major reorganization of the library to bring that department into "the 21st century". She reports directly to C. Morgan, the editor. With respect to the library reorganization, Handy conducted research, formulated a proposal and formally recommended a specific firm to conduct the automation of the library services, i.e., the storage and retrieval of information. That recommendation was accepted. Handy evaluated the access to the library by the public and the library hours generally. She determined that the hours of public access should be reduced and the Saturday morning shift eliminated. Those changes were implemented. Handy assigned various duties to the staff and altered those duties as appropriate. Handy concluded that additional staff were required for the library to function properly. When she took up her post, the library had three full-time staff - herself, D. Chuk and S. Rowe. Since her hiring, Handy advertised, interviewed, hired and trained, as needed, two part-time temporary staff, one full-time permanent staff and one full-time temporary staff member. She formulates the library's budget and her recommendations as to equipment purchases have been approved. It is accurate to note that "final" approval, in one sense, of library budget, purchases, hours, etc. lies with the editor, Morgan, and, ultimately, the publisher. It is evident, however, that those sorts of decisions are effectively made by Handy. Even if her "decisions" are characterized as "recommendations", they are "effective recommendations" which, in the context of the jurisprudence, support a conclusion that Handy is "managerial".

23. Handy also approves overtime and time off, schedules vacation and completes attendance records for payroll. Those duties, as well as training new employees, are also performed by other department heads, some of whom are included in and others excluded from the bargaining unit. While such responsibilities, in isolation, would not support Handy's classification as managerial, those duties, in the context of her other responsibilities, strengthen rather than weaken that classification. Moreover, Handy not only trained new employees, she also trained the existing staff with respect to the electronic equipment installed as part of the automation of the library.

24. The Board is cognizant that there must be a sophisticated assessment of duties and responsibilities in a professional context in connection with section 1(3)(b) of the Act. Much of the

jurisprudence has concerned the nursing profession but some has dealt with professional librarians as well. The Board has reviewed the cases cited by counsel but does not regard it as useful to comment upon those cases individually or at length. All cases affirmed the general indicia for characterizing a person as an "employee" or "managerial" and the result in each case reflected the particular constellation of duties and responsibilities by the individuals in dispute in the context of that employer's organization. In several cases, the employee status of the "librarian" was resolved on agreement (e.g., *MacLean Magazine, supra*) or not directly an issue (e.g., *The Beacon Herald of Stratford Limited, supra*; *East York Public Library Board, supra*). In the last noted case, chief librarian, assistant chief librarian and librarians in charge of branches were excluded whereas in *The Thunder Bay Public Library Board, supra*, the branch librarian was regarded as an "employee", in contrast to the district librarian who was "managerial". While none of the cases are directly on point, the most helpful to the instant determination is probably *York University, supra*, which supports the applicant's position. There, the head of acquisitions in the law library was excluded as having "effective control" of that operation notwithstanding that she had "subsumed a managerial function that may very well not have been anticipated in her job description". In the instant case, Handy is responsible for and has "effective control" over the library in a sense which goes beyond the "professional librarian" context and is "managerial" in nature. As noted *infra* (at paragraph 33), the evolution of Handy's responsibilities is yet further in the direction of the "managerial" end of the "manager-employee" continuum.

25. The Board is also sensitive to the concerns expressed in *J. M. Schneider Inc., supra*, that, where the alleged "manager" has only a small number of subordinates, the Board will carefully scrutinize the situation for concrete instances of the actual decision-making authority and that "an employer has some onus to organize its affairs so that employees are not *occasionally* placed in such positions of potential conflict of interest if that result can readily be avoided". Indeed, the Board therein cautioned that the "sprinkling" of managerial duties over a number of persons might well result in the exclusion of none of them as managerial. Having carefully reviewed the evidence in the instant case, the Board is satisfied that the presence of Handy in the bargaining unit does raise precisely the "mischief" which section 1(3)(b) was intended to avoid.

26. Notwithstanding respondent counsel's vigorous attempts to minimize the "managerial" nature of Handy's duties and her "interchangeability" with the other staff, specifically D. Chuk and S. Rowe, the only reasonable conclusion is that Handy's role is qualitatively different. The matters noted in paragraphs 26, 27 and 28 need not be repeated here. Beyond that, it is apparent that, in Handy's absence, Rowe and/or Chuk assume only routine aspects of Handy's position. Any significant matters are referred to Morgan or Handy is contacted by telephone if possible or simply await Handy's return. That Handy, when at work, will also answer the telephone if no one else if available or photocopy something needed immediately does not detract from the overall managerial cast of her job.

27. The involvement of an individual in the discipline and the evaluation of other workers has always been closely examined given the inevitable conflicts which would arise if persons with critical authority in such areas were included in the same bargaining unit with such workers. In the instant case, Handy has faced precisely such conflicts in seeking to fulfill her responsibility for the library's operation. On one occasion, Handy instructed D. Chuk to refrain from spending so much time on personal telephone calls during working hours. Briefly put, Chuk did not take kindly to such an admonition from a "fellow employee". The incident escalated and was more or less resolved at a meeting of Handy, Chuk, Morgan and D. Firby, the union president. Respondent's counsel strenuously tried to characterize the incident as a "personality conflict". The Board disagrees. What happened was an attempt by Handy to exercise her supervisory authority so as to prohibit what she regarded as an inappropriate use of the telephone for personal matters during

working hours. That attempt, not surprisingly, was opposed by an employee with roughly 15 years service in the library who resented that "intrusion" by a "co-worker". Handy is responsible for running the library. There are no other "management" personnel to assume a disciplinary role as Handy reports directly to Morgan and the library is functionally quite distinct from the other departments. This is not an instance where an employer has multiplied "managerial-sounding" job titles and sub-divided its organizational structure in an effort to proliferate "management" persons.

28. A similar conflict arose over the attempt by Handy to evaluate her staff. Chuk and Rowe (another long service employee in the library) adamantly opposed such evaluations. Again, meetings with Firby and Morgan ensued which confirmed that Handy could not conduct "formal" evaluations as only "management" could do so and she was a bargaining unit member. The result is not to confirm Handy's bargaining unit status but, again, to underscore the inherent conflicts which would repeatedly surface if Handy was to remain in the bargaining unit. Realistically, Handy is the only person who could evaluate the library staff and must do so to properly carry out her responsibilities.

29. Several other matters are worthy of comment. One is that Handy's position bears marginal resemblance at best to that of F. Curry, the former "librarian" who retired in December 1983. More importantly, the issue before the Board is not what Curry ostensibly did but what Handy actually does. The Board's decision is based on an assessment of the latter. Secondly, Handy's job has evolved since assuming her position in January 1984 and the development has consistently been in the direction of increasing the "managerial" aspects and lessening more routine duties given the changes in the operation of the library department with the advent of electronic storage and retrieval of information. Thirdly, the parties' collective bargaining relationship itself is in its early stages. The respondent was certified in June 1983 and the first collective agreement settled in April 1984, effective January 1, 1984 to December 31, 1985. The second collective agreement, covering January 1, 1986, to December 31, 1987 was finalized in May 1986. It is to be expected that there be some "shaking out" during this period particularly given the overhaul of the library functions. This is not an instance where an individual has functioned for many years either in or out of the bargaining unit in the context of a long-standing collective bargaining relationship. In the Board's view, the initial readjustment period flowing from the inauguration of a collective bargaining regime has revealed precisely the mischief against which section 1(3)(b) was directed, namely, the inappropriateness of the continued inclusion of Handy in the bargaining unit.

30. For the foregoing reasons, this Board finds that Handy exercises managerial functions within the meaning of section 1(3)(b) of the Act. Accordingly, the application under section 106(2) of the Act is granted.

DECISION OF BOARD MEMBER M. JONES:

1. I dissent from the majority decision. At issue in this decision are two fundamental alterations to Board practice: the need to prove changes in a position and the need to expressly reserve at the bargaining table the right to bring an application.

2. The new detailed procedures for future applications of this type would appear to have considerable merit. Also, the support for making a duties and responsibilities review a full one appears to be simply a recognition of the reality of most examinations that occur in this type of complaint.

3. However, at risk in this decision is the practice of requiring a change in duties to be

proven before a change in status can be justified. The standard tests for managerial and confidential duties do not assist in situations such as this one where the issues revolve around professional status. The decision may be interpreted as replacing the objective yardstick of actual changes in the job with an as yet to be determined different emphasis. When one considers the type of evidence that might be relevant, the evidence would be of changes unless any prior determination or negotiation or other agreement as to the person's status fell into question as well. Consequently, an effect of this decision may be to lessen the weight of the agreements of the parties as this has been reflected through the history of job postings, certifications and negotiated agreements. The Board has traditionally viewed these agreements between the parties as the best possible representation of the facts and has accepted such agreements (and prior determinations) as evidence of the greatest significance. This decision appears to undermine that importance and in my view such a move would not assist labour relations.

4. In addition, this decision implies that the "expressed reservation" of the negotiating procedure is no longer necessary before such an application may be made. The failure to express a reservation about the status of a particular position during the course of bargaining would appear to become part of the history of the position and therefore part of the evidence once a complaint has been made and is being heard. This does not recognize the dynamics of the negotiating process. In effect, this decision implies that a particular position could be tabled during negotiations, discussed by the parties, decisions made on the basis of the discussions, withdrawn by the tabling party, and decisions made on the basis of the withdrawal. All this occurs within the very inexact process of giving and taking during negotiations. A party could then turn around and ignore the process and apply virtually anytime for a determination of the person's status. If it is no longer necessary to declare this intention at the bargaining table, the balance will shift to the detriment of the other party. The effect of this change of practice may be very far reaching and not conducive to the establishment of harmonious labour relations.

5. With respect to this individual's status, I disagree with the majority. When Ms. Handy joined the Windsor Star, she did so in a bargaining unit position. She then proceeded to do the duties outlined in the job posting she responded to. This position was included in the bargaining unit at certification and in the first agreement.

6. From the beginning, the individual indicated that she felt her professional status was somewhat diminished by the actual job. Her attempts to change the situation and place herself in charge were all defeated by her supervisor. Much evidence exists that the bulk of her work is performed by the other two full-time members of the department as well. Certainly, their work stations were similar in status, their duties interchangeable.

7. Also shared were some of the functions which could be deemed to be most significant, such as cash access and training of part-timers. Taking the total testimony, there is nothing to suggest that Ms. Handy did or needed to supervise the other employees in this very small department.

8. Regarding the claim that she exercised managerial functions, while not being invited to management meetings, there is not a single instance to uphold that claim. It is most unlikely that a lot of managers consider delivering memos and picking up routine filing material to be part of their jobs. In fact, numerous references are made, some of them in writing, to her need to seek permission. Even her recommending power was extremely limited, as her testimony over the automation of the library proved. This part of her job, to research and advise on automation, was included as part of the initial posting and hiring and thus should not be pointed to now as proof that she is a manager.

9. The only example of the alleged managerial duties was the cancellation of Saturday

office hours. It is difficult to characterize this as a management decision when it would likely have been a collegial decision within the department. All other attempts at decision-making were squelched, and Ms. Handy's attempt to discipline is a prime example.

10. Within the testimony, three aspects strongly oppose the decision to declare her excluded from the bargaining unit:

- i) While much is made of her control over the automation of the library, she, herself, testified that her two recommendations about automation -- first, not to do it, and second, her original choice of company -- were both overturned by her superiors in the company, thus refuting her recommending power.
- ii) The decision to cancel the Saturday work hours is offered as proof of her managerial status. However, until what was probably a collegial decision was made, she, like the other two members of the staff, worked her share of Saturdays and substituted a mid-week half-day off, just like all employees.
- iii) Extensive examination about the practices of other department heads who were members of the bargaining unit was instructive in that it showed that all of their decisions, like all of Ms. Handy's, ultimately required approval.

11. Of great concern should be the impact of this decision on the make-up of the bargaining unit. Counsel for the Union made the point that in unionized workplaces where small departments exist to service the primary function of the enterprise, it is not unusual for there to be no excluded manager of the department but rather a lead-hand arrangement. Certainly, there are numerous agreements in which librarians work professionally and are deemed to be non-managerial. These two elements are not in contradiction in this case and I would have dismissed the application.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1988

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3287-86-R: Ontario Public Service Employees Union (Applicant) v. Grand River Conservation Authority (Respondent)

Unit: "all employees of the respondent in the Cities of Cambridge, Brantford and Waterloo, the Towns of Dunville and Haldimand and the Townships of West Garafraxa, Peel, Pilkington, Guelph, East Luther, South Dumfries, North Dumfries, Brantford and Burford, save and except managers, persons above the rank of manager, professional and graduate engineers employed in an engineering capacity, office and clerical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (97 employees in unit) (*Clarity Note*)

0633-87-R: Labourers' International Union of North America, Ontario Provincial District Council

Unit: "all construction labourers in the employ of the respondent in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1824-87-R: United Steelworkers of America (Applicant) v. Bimac Canada Metallurgical Limited (Respondent)

Unit: "all employees of the respondent in the City of Burlington, save and except foreperson, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (41 employees in unit)

1828-87-R; 1867-87-R: Labourers' International Union of North America, Local 493 (Applicant) v. Scoralin Dillingham, a Joint Venture (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building and in the Townships of Kirkpatrick, Caldwell, Springer, South Himsworth, Laurier, Strong, Armour and Perry and the Townships adjacent thereto except those portions of the aforementioned Townships that are included within the area encompassed within a radius of 33 kilometers (approximately 20 miles) of the North Bay Post Office and within the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foremen" (24 employees in unit) (*Having regard to the agreement of the parties*)

1933-87-R: International Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Scoralin Dillingham, a Joint Venture (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in all sectors of the construction industry other than the industrial, commercial and institutional sector within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office and in the Townships of South Himsworth, Laurier, Strong, Armour and Perry and the Townships adjacent thereto except those portions of the aforementioned Townships included in

the district Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman" (27 employees in unit)

2029-87-R: Labourers' International Union of North America, Local 607 (Applicant) v. Pry-Con Construction Inc. (Respondent)

Unit: "all construction labourers and all persons engaged in cement finishing, waterproofing, and restoration work employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2034-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Stolp Homes (Toronto) Inc., Stolp Building (Whitby) Corp., Vogue Developments Inc., Penta Stolp Corp., Liverpool Finch Contractors Ltd., Harmony Hills Developers Inc., and Earnbridge Investors Inc. (Respondents) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in all sectors other than the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit)

2105-87-R: United Steelworkers of America (Applicant) v. Allan & Marion Super Discount Marts Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its store in the City of Barrie, save and except head cashiers, department managers, persons above the rank of department manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (62 employees in unit)

2262-87-R: The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. 542590 Ontario Ltd., c.o.b. as Travelers Motor Inn (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2280-87-R: United Steelworkers of America (Applicant) v. Brampton & District Unemployed Help Centre, Inc. (Respondent)

Unit: "all employees of the respondent in the City of Mississauga and the City of Brampton, save and except president and persons above the rank of president" (2 employees in unit) (*Having regard to the agreement of the parties*)

2288-87-R: Labourers' International Union of North America, Local 1981 (Applicant) v. 542590 Ontario Ltd., c.o.b. as Travelers Motor Inn (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foremen" (2 employees in unit)

2386-87-R: International Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Scoralin Dillingham, a Joint Venture (Respondent)

Unit: “all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in all sectors of the construction industry other than the industrial, commercial and institutional sector within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building and in the Townships of Kirkpatrick, Caldwell and Springer and the Townships adjacent thereto except those portions of the aforementioned Townships that are included within the area encompassed within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman” (10 employees in unit)

2393-87-R: Int'l. Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Madeleine Mines Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, truck drivers and construction labourers, in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (40 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2406-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Scoralin Dillingham, a Joint Venture (Respondent) v. Int'l. Union of Operating Engineers & General Workers, Local 793 (Intervener)

Unit: “all construction labourers in the employ of the respondent in all sectors of the construction industry other than industrial, commercial and institutional sector within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2454-87-R: Ontario Nurses' Association (Applicant) v. Caressant Care Nursing Home of Canada Limited (Respondent)

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent in the City of Cambridge, save and except Director of Nursing, persons above the rank of Director of Nursing and persons regularly employed for not more than 24 hours per week” (5 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

2483-87-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Huron Steel Fabricators (London) Ltd. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 3054 (Intervener)

Unit: “all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers' apprentices in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, save and except non-working foremen, persons above the rank of non-working foreman, and employees for whom other trade unions held bargaining rights as at December 8, 1987” (3 employees in unit)

2617-87-R: Canadian Union of Public Employees (Applicant) v. The Welland County Roman Catholic Separate School Board (Respondent)

Unit: “all office and clerical employees of the respondent at its administration offices in the Regional Municipality of Niagara, save and except supervisors, persons above the rank of supervisor, secretary to the Director of Education, Executive Assistant to the Director of Education, secretary to the Business Administrator, secretary to the Superintendent of Human Resources, secretary to the Manager of Personnel Services, secretary to the Controller of Plant, secretary to the Superintendent of French Schools, Personnel and Payroll Systems

Administrator, child care workers, technicians, teacher aides, students employed in cooperative education programs, students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of the date of application, being December 21, 1987" (30 employees in unit) (*Having regard to the agreement of the parties*)

2618-87-R: Canadian Union of Public Employees (Applicant) v. The Governing Council of the University of Toronto (Respondent) v. Royal Conservatory of Music Faculty Association (Intervener)

Unit: "all employees of the respondent, save and except forepersons, persons above the rank of foreperson, faculty, office and clerical staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons for whom any trade union held bargaining rights as of December 21, 1987" (847 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2651-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Bosal Canada Inc. (Respondent) v. Group of Employees (Objetors)

Unit: "all employees of the respondent in the Township of Kingston, save and except foremen, persons above the rank of foremen, office and sales staff" (38 employees in unit) (*Having regard to the agreement of the parties*)

2709-87-R: Ironworkers District Council of Ontario (Applicant) v. Kingston Contracting Limited (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

2793-87-R: International Brotherhood of Painters & Allied Trades (Applicant) v. The Governing Council of the University of Toronto (Respondent)

Unit: "all painters and painters apprentices employed by the respondent working in and out of the St. George Physical Plant Department of the University of Toronto, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit) (*Having regard to the agreement of the parties*)

2834-87-R: United Food & Commercial Workers International Union (Applicant) v. Madoc C.O.P.E. Corporation (Respondent)

Unit: "all employees of the respondent in the Town of Madoc, save and except Assistant Managing Director and persons above the rank of Assistant Managing Director" (4 employees in unit) (*Having regard to the agreement of the parties*)

2835-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. brunner Fleet Products Inc. (Respondent)

Unit: "all employees of the respondent in Niagara Falls, save and except foremen, persons above the rank of foremen, office and sales staff" (24 employees in unit)

2859-87-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Arnprior (Respondent) v. Int'l. Union of Operating Engineers & General Workers, Local 793 (Intervener)

Unit: "all employees of the respondent in the Town of Arnprior, save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of January 19, 1988" (10 employees in unit) (*Having regard to the agreement of the parties*)

2875-87-R: Int'l. Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Quality Classic Replicars (Canada) Inc. (Respondent)

Unit: "all employees of the respondent in the Township of Atikokan, save and except foreman, persons above the rank of foreman, office, clerical and sales staff" (10 employees in unit) (*Having regard to the agreement of the parties*)

2895-87-R: Canadian Union of Public Employees (Applicant) v. Ferncliff Daycare & After School Group (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, and bookkeeper" (4 employees in unit) (*Having regard to the agreement of the parties*)

2909-87-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Dufferin County Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the County of Dufferin, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (12 employees in unit) (*Having regard to the agreement of the parties*)

2914-87-R: United Steelworkers of America (Applicant) v. Algoma Steel Club (Respondent)

Unit #1: "all employees of the respondent in the City of Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor, office staff and persons regularly employed for not more than 24 hours per week" (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of the respondent in the City of Sault Ste. Marie regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, and office staff" (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2916-87-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers Union of America (UAW) (Applicant) v. Oak's Inn (Wallaceburg) Inc. (Respondent)

Unit: "all employees of the respondent at Wallaceburg, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor" (27 employees in unit) (*Having regard to the agreement of the parties*)

2922-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Ultra Interiors Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2938-87-R: Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. Imperial Courier Service, division of Canadian Courier Service Ltd. (Respondent)

Unit: "all employees of the respondent working in and out of the Municipality of Metropolitan Toronto, save and except dispatchers and supervisors, persons above the rank of dispatchers and supervisors, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (40 employees in unit) (*Having regard to the agreement of the parties*)

2949-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Pebra Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Peterborough, save and except supervisors, persons above the rank of supervisor, office and sales staff and students employed during the school vacation period" (168 employees in unit) (*Having regard to the agreement of the parties*)

2958-87-R: The International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada, Local 105 (London, Ontario) (Applicant) v. Theatre London (Respondent)

Unit: "all employees of the respondent in the City of London employed as scenic carpenters in the Grand Theatre (Grand Stage)" (4 employees in unit) (*Having regard to the agreement of the parties*)

2962-87-R: Canadian Union of Public Employees (Applicant) v. Providence Villa & Hospital (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, undergraduate dietitians, technical personnel, office and clerical staff and persons in bargaining units for which any trade union held bargaining rights as of February 2, 1988" (211 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2963-87-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. The Corporation of the Town of Palmerston (Respondent)

Unit #1: "all employees of the respondent in the Town of Palmerston, save and except foreman, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of the respondent in the Town of Palmerston regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, and office and clerical staff" (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2976-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. P. J. Wallbank Manufacturing Co. Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Blandford-Blenheim Township, save and except foreman, persons above the rank of foreman, professional engineers, engineering technicians, training co-ordinators, designers and draftsmen, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed in co-operative education programs" (87 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2978-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ron Robinson (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

2995-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. J.M.A. Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the con-

struction industry other than the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2996-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Meira & Meira Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2997-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. 568127 Ontario Inc., c.o.b. as Ultramar Carpentry & Finishing (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2998-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Doorset Carpentry Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector of the construction industry, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

3000-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. C.M. Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector of the construction industry, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3026-87-R: Ontario Secondary School Teachers' Federation (Applicant) v. Essex County Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the County of Essex, save and except employees teaching pursuant to Part IX of the *Education Act* and persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (55 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3029-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Mahogany Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the con-

struction industry other than the industrial, commercial and institutional sector of the construction industry, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3030-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Feliz Andre Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3031-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Hallman Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3032-87-R: Canadian Union of Public Employees (Applicant) v. William W. Creighton Centre (Respondent)

Unit: "all office and clerical employees of the respondent in the City of Thunder Bay, save and except supervisor, persons above the rank of supervisor, and the executive secretary to the executive director" (4 employees in unit) (*Having regard to the agreement of the parties*)

3033-87-R: Canadian Union of Public Employees (Applicant) v. Jewish Immigrant Aid Services of Canada, Toronto Region (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except Executive Director, persons above the rank of Executive Director, and Secretary to Executive Director" (6 employees in unit) (*Having regard to the agreement of the parties*)

3048-87-R: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Corporate Foods Ltd. (Respondent)

Unit: "all employees of the respondent in Barrie, save and except supervisors, persons above the rank of supervisor, and office, clerical and sales staff" (3 employees in unit) (*Having regard to the agreement of the parties*)

3055-87-R: Labourers' International Union of North America, Local 527 (Applicant) v. New Look Restoration (Ottawa) Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

3056-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Frias Trim Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and car-

penters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3057-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Four Seasons Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3066-87-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. The Governing Council of the University of Toronto (Respondent)

Unit: "all control technicians working in and out of St. George Physical Plant Department of the University of Toronto, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) (*Having regard to the agreement of the parties*)

3077-87-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Colonial Furniture (Ottawa) Ltd. (Respondent)

Unit: "all employees of the respondent at Gloucester regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, and office and sales staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

3091-87-R: International Union of United Plant Guard Workers of America, Local 1962 (Applicant) v. Women's College Hospital (Respondent)

Unit: "all security guards in the employ of the respondent, save and except chief security officer and persons above the rank of chief security officer" (8 employees in unit) (*Having regard to the agreement of the parties*)

3106-87-R: Labourers' International Union of North America, Local 506 (Applicant) v. T. O'Leary Construction Corp. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

3107-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. T. O'Leary Construction Corp. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the

Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

3111-87-R: Service Employees' International Union, Local 204, S.E.I.U., AFL:CIO:CLC (Applicant) v. The Glebe Rest Home Ltd., c.o.b. as The Glebe Manor (Respondent)

Unit #1: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except registered, graduate and undergraduate nurses, supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (10 employees in unit)

Unit #2: (see *Applications for Certification Withdrawn*)

3113-87-R: Ontario Catholic Occasional Teachers' Association (Applicant) v. The Essex County Roman Catholic Separate School Board (Respondent)

Unit: "all occasional teachers employed by the respondent in Essex County, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3121-87-R: Canadian Union of Public Employees (Applicant) v. Hamilton Civic Hospitals Employees Co-operative Childcare Centre (Respondent)

Unit: "all employees of the respondent in the City of Hamilton, save and except Assistant Director, and persons above the rank of Assistant Director" (16 employees in unit) (*Having regard to the agreement of the parties*)

3128-87-R: The Association of General Studies Teachers in Hebrew Day Schools (Applicant) v. Netivot Hatorah Day School (Respondent) v. Federation of Teachers in Hebrew Schools (Intervener)

Unit: "all teachers employed by the respondent as general studies teachers in the Municipality of Metropolitan Toronto, save and except vice-principals and persons above the rank of vice-principal" (15 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3129-87-R: Ontario Liquor Boards Employees Union (Applicant) v. Thousand Islands Tax/Duty Free Store Ltd. (Respondent)

Unit: "all employees of the respondent at Lansdowne, save and except senior supervisor, those above the rank of senior supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit) (*Having regard to the agreement of the parties*)

3158-87-R: Sheet Metal Workers' International Association, Local 473 (Applicant) v. 397026 Ontario Ltd., c.o.b. as Ambient Systems (Respondent)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3177-87-R: Matthews Hall Teachers' Association (Applicant) v. Matthews Hall (Respondent)

Unit #1: "all teachers and teaching assistants employed by the respondent in London, save and except the head mistress, the bursar and persons regularly employed for not more than 24 hours per week" (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all teachers and teaching assistants of the respondent regularly employed for not more than 24

hours per week, save and except the head mistress and the bursar" (9 employees in unit) (*Having regard to the agreement of the parties*)

3183-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Kamrus Construction Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3184-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Main Mechanical Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit) (*Clarity Note*)

3185-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. The Bratti Group (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit) (*Clarity Note*)

3186-87-R: Int'l. Union of Operating Engineers & General Workers, Local 793 (Applicant) v. The Foundation Company of Canada Ltd. (Respondent)

Unit: "all employees of the respondent engaged in survey work in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3201-87-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Dowcon Sheet Metal Ltd. (Respondent)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3202-87-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Superior Plumbing & Heating Co. Ltd. (Ontario Corp. #246493) (Respondent)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province

of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough, the geographic Township of Manvers in the County of Victoria and in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers, and the provisional County of Haliburton, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

3222-87-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Prentice Lewis Associates (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the province of ontario, and all painters and painters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit) (*Clarity Note*)

3268-87-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Robco Electric Inc. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

3306-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 27 (Applicant) v. D & S Carpentry & Stairs (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3308-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 27 (Applicant) v. J & D Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3309-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 27 (Applicant) v. Steve Barisic, Carpenter (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that por-

tion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3323-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 27 (Applicant) v. Porrino Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1271-86-R: Great Lakes Fishermen & Allied Workers' Union (Applicant) v. C.P. Fisheries Ltd. (Respondent)

Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except boat captain and those above the rank of boat captain, and office and clerical staff" (6 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	5
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

0631-87-R: Construction Workers Local 6, affiliated with the Christian Labour Association of Canada (Applicant) v. Dunmark Electric (Ancaster) Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 105 (Intervener) v. Group of Employees (Objectors)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the United Counties of Leeds and Grenville, save and except employees in bargaining units for which any trade union held bargaining rights as of June 12, 1987" (83 employees in unit)

Number of names of persons on revised voters' list	83
Number of persons who cast ballots	31
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	2
Ballots segregated and not counted	1

1278-87-R: Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Murray & Ken Loop Fishery Ltd. (Respondent)

Unit: "all employees of the respondent employed in fishing in and out of Wheatley, save and except those above the rank of Boat Captain" (24 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	24
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	6
Ballots segregated and not counted	10

1283-87-R: Canadian Paperworkers Union (Applicant) v. Great Lakes Forest Products Limited (Respondent) v. The Lumber & Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters & Joiners of America (Intervener #1) v. International Woodworkers of America (Intervener #2)

Unit: "all employees of the respondent who are engaged in woods operations on the limits, and on the work sites of the respondent" (289 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	289
Number of persons who cast ballots	254
Number of ballots marked in favour of applicant	167
Number of ballots marked in favour of Intervener #1	5
Number of ballots marked in favour of Intervener #2	82

1926-87-R: Quaker Oats Employees Independent Union (Cereals) (Applicant) v. The Quaker Oats Company of Canada Ltd. (Respondent) v. United Food & Commercial Workers International Union, Local 293 (Intervener)

Unit: "all employees of the respondent at its plant and warehouse in Peterborough, save and except foremen, persons above the rank of foreman, office and sales staff, technical staff, stationery engineers and employees in bargaining units for which the International Union of Operating Engineers, Local 796, held bargaining rights as of October 14, 1987" (341 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2196-87-R: Int'l. Union of Operating Engineers & General Workers, Local 796 (Applicant) v. Toronto Hospital, o/a Toronto Western Hospital (Respondent) v. Canadian Union of Public Employees (Intervener #1) v. Canadian Union of Operating Engineers & General Workers (Intervener #2)

Unit: "all stationary engineers and refrigeration mechanics employed by the respondent at its pre-existing Toronto Western Hospital site, save and except assistant chief engineer and persons above the rank of assistant chief engineer" (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	11
Number of ballots marked in favour of applicant	11
Number of ballots marked in favour of intervener #2	0

2546-87-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. C-Tech Ltd. (Respondent) v. C-Tech Employees' Association (Intervener)

Unit: "all employees of the respondent in Cornwall, save and except supervisors, persons above the rank of supervisor, engineering, drafting, office, sales and clerical staff" (124 employees in unit)

Number of names of persons on revised voters' list	124
Number of persons who cast ballots	114
Number of spoiled ballots	5
Number of ballots marked in favour of applicant	57
Number of ballots marked in favour of intervener	52

2736-87-R: International Woodworkers of America (Applicant) v. R.A. Kiiskila Building Materials Ltd. (Respondent) v. Lumber & Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except assistant manager, persons above the rank of assistant manager, watchman and office and sales staff" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	8
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener	0

2737-87-R: International Woodworkers of America (Applicant) v. D. Corbett Building Materials Ltd. (Re-

spondent) v. Lumber & Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except assistant manager, persons above the rank of assistant manager, watchman, office and sales staff" (2 employees in unit) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	2
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

2738-87-R: International Woodworkers of America (Applicant) v. North American Lumber Ltd. (Respondent) v. Lumber & Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except the assistant manager, persons above the rank of assistant manager, office and sales staff" (4 employees in unit)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0

2739-87-R: International Woodworkers of America (Applicant) v. Wanson Lumber Co. (1957) Ltd. (Respondent) v. Lumber & Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except assistant manager, persons above the rank of assistant manager, watchman, office and sales staff" (7 employees in unit)

Number of names of persons on list as originally prepared by employer	7
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	6
Number of ballots marked in favour of intervener	0

2740-87-R: International Woodworkers of America (Applicant) v. Wanson Millwork Ltd. (Respondent) v. Lumber & Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except assistant manager, persons above the rank of assistant manager, watchman, office and sales staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	0

2821-87-R: Labourers' International Union of North America, Local 527 (Applicant) v. Empire Maintenance Industries Inc. (Respondent) v. Service Employees Union, Local 219 (Intervener)

Unit: "all employees of the respondent at the University of Ottawa, save and except resident foremen, persons above the rank of resident foreman, office, clerical and sales staff" (63 employees in unit)

Number of names of persons on list as originally prepared by employer	63
Number of persons who cast ballots	30
Number of segregated ballots cast by persons whose names appear on voters' list	26
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	2

Number of ballots marked in favour of applicant	22
Number of ballots marked in favour of intervener	4
Ballots segregated and not counted	2

2850-87-R: International Woodworkers of America (Applicant) v. Moyer Vico Corp. (Respondent)

Unit: "all employees of the respondent at 25 Milvan Drive in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (26 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	26
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	25
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	8
Ballots segregated and not counted	1

3010-87-R: Teamsters Local No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Coles Book Stores Ltd. (Respondent) v. Canadian Paperworkers Union (Intervener)

Unit: "all employees of the respondent at its warehouse in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (36 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	36
Number of persons who cast ballots	30
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	16
Number of ballots marked in favour of intervener	12

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0701-87-R: Ontario Catholic Occasional Teachers' Association (Applicant) v. The Lakehead District Roman Catholic Separate School Board (Respondent)

Unit: "all occasional teachers employed by the respondent in the City of Thunder Bay, save and except persons who, when they are employed as occasional teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (144 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	144
Number of persons who cast ballots	41
Number of ballots marked in favour of applicant	37
Number of ballots marked against applicant	2
Ballots segregated and not counted	2

0925-87-R: United Steelworkers of America (Applicant) v. Benoma Metal Products Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, and students employed during the school vacation period" (47 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	55
Number of persons who cast ballots	50

Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	9

1219-87-R: International Union of Elevator Constructors, Local 90 (Applicant) v. Riverside Elevators Inc. (Respondent) v. Construction Workers, Local 53, C.L.A.C. (Intervener)

Unit: "all elevator mechanics and elevator mechanics' helpers in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener	1

2545-87-R: Ontario Nurses' Association (Applicant) v. Caressant Care Nursing Home of Canada Ltd. (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all registered and graduate nurses regularly employed in a nursing capacity for not more than 24 hours per week, save and except Director of Nursing and persons above the rank of Director of Nursing" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0

Applications for Certification Dismissed Without Vote

1843-86-R: Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Philcox & Elsley Fishery Ltd. (Respondent) (7 employees in unit)

0305-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Mastrandony Construction Ltd. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (formerly Local 1190) (Intervener) (22 employees in unit)

0868-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. The Corporation of the City of Toronto (Respondent) v. Canadian Union of Public Employees, Local 79 (Intervener #1) v. Metropolitan Toronto Civic Employees' Union, Local 43, Canadian Union of Public Employees (Intervener #2) (731 employees in unit)

1791-87-R: Teamsters Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Fidelitas Holding Co. Ltd. (Respondent) (55 employees in unit)

2897-87-R; 2898-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Johnson Controls Ltd. (Respondent) v. Canadian Pneumatic Control Contractors Association ("CPCCA") (Intervener) (23 employees in unit)

2899-87-R; 2900-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Robertshaw Controls Canada Inc. (Respondent) v. International Brotherhood of Electrical Workers, Local 353 (Intervener) (5 employees in unit)

2901-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Honeywell Ltd. (Respondent) (25 employees in unit)

2902-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Honeywell Ltd. (Respondent) (12 employees in unit)

2903-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. MCC Powers, Unit of Mark Controls Ltd. (Respondent) v. Canadian Pneumatic Control Contractors Association (“CPCCA”) (Intervener) (5 employees in unit)

2904-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. MCC Powers, Unit of Mark Controls Ltd. (Respondent) v. Canadian Pneumatic Control Contractors Association (“CPCCA”) (Intervener) (14 employees in unit)

2905-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Windeler Electric Co. (Respondent) (6 employees in unit)

2906-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Windeler Electric Co. (Respondent) (6 employees in unit)

2930-87-R: Glass, Pottery, Plastics & Allied Workers International Union (Applicant) v. VS Services Ltd. (Respondent) (34 employees in unit)

3093-87-R: Fraternit 2i Inter-Provinciale des Ouvriers en Electricité/Inter-Provincial Brotherhood of Electrical Workers (Applicant) v. Custom Muffler Service Ltd. (Respondent) v. Group of Employees (Objectors) (5 employees in unit)

3181-87-R: Labourers’ International Union of North America, Local 506 (Applicant) v. T.R.A.C. Construction Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (39 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1283-86-R: Great Lakes Fishermen & Allied Workers’ Union (Applicant) v. H. Tiessen Fisheries Ltd. (Respondent)

Unit: “all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of Boat Captain” (8 employees in unit)

Number of names of persons on revised voters’ list	8
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	3
Ballots segregated and not counted	2

0630-87-R: Construction Workers, Local 6, affiliated with the Christian Labour Association of Ontario (Applicant) v. Dunmark Electric (Ancaster) Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 105 (Intervener) v. Group of Employees (Objectors)

Unit: “all electricians, electricians’ apprentices and labourers in the employ of the respondent in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk, and in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foreman and persons above the rank of non-working foreman” (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	5

1990-87-R: International Woodworkers of America (Applicant) v. G.W. Martin Veneer Ltd. (Respondent)

Unit: "all employees of the respondent in North Bay, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (33 employees in unit)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	33
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	22

2822-87-R: International Woodworkers of America (Applicant) v. Title Distributing Ltd. (Respondent)

Unit: "all employees of the respondent at or out of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	19
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	13

Applications for Certification Withdrawn

1755-87-R: Teamsters Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. 388685 Ontario Ltd., c.o.b. as Central Paving (Respondent)

2106-87-R: United Steelworkers of America (Applicant) v. Allan & Marion Super Discount Marts Ltd. (Respondent) v. Group of Employees (Objectors)

2540-87-R: Int'l. Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Cambridge Rigging Central Ltd. (Respondent)

2779-87-R: Ontario Public School Teachers' Federation (Applicant) v. The Board of Education for the City of Toronto (Respondent) v. Ontario Secondary School Teachers' Federation (Intervener)

2960-87-R: United Electrical, Radio & Machine Workers of Canada (UE) (Applicant) v. Modular Controls Ltd. (Respondent)

3060-87-R: RNAs of Riverview Manor, spokesperson Tracy Miller (Applicant) v. Service Employee's Union, Local 183 (Respondent)

3068-87-R; 3069-87-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. The Board of Education for the City of Toronto (Respondent)

3111-87-R: Service Employees' International Union, Local 204, S.E.I.U., AFL:CIO:CLC (Applicant) v. The Glebe Rest Home Ltd., c.o.b. as The Glebe Manor (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and stu-

dents employed during the school vacation period, save and except registered, graduate and undergraduate nurses, supervisors, persons above the rank of supervisor, and office and clerical staff' (employees in unit)

3133-87-R: Ontario Nurses' Association (Applicant) v. Newcastle Health Care Centre (Respondent)

3214-87-R: International Ladies' Garment Workers Union (Applicant) v. Decor Manufacturing Co. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

2912-87-FC: United Steelworkers of America (Applicant) v. Miller Fluid Power (Canada) Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2333-86-R: International Union of Bricklayers & Allied Craftsmen, Local 7 (Applicant) v. DMA Masonry Ltd., DeMartins (DMA) Inc., and DeMarinis Construction Ltd. (Respondent) (*Withdrawn*)

2600-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. R.G. Kirby & Sons Ltd., R.G. Kirby Construction Ltd., and Goldie Burgess Ltd. (Respondents) (*Dismissed*)

1879-87-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Joe Davis - Electrician, Davis Electrical Contracting Ltd., and Sunset Electrical Contracting (Respondents) (*Granted*)

2112-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Stolp Homes (Toronto) Inc., Stolp Building (Whitby) Corp., Vogue Developments Inc., Penta Stolp Corp., Liverpool Finch Contractors Ltd., Harmony Hills Developers Inc., Earmbridge Investors Inc., Stolp Building (Bridlethorn) Corp., Stolp Building (Bridlepath) Corp., and Stolp Building (Pickering) Corp. (Respondents) (*Granted*)

2576-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Fish General Contractors Ltd., Arthur J. Fish & Son Ltd., Arthur J. Fish Ltd., and A.J. Fish & Son Ltd. (c.o.b. as Fish General Contractors and A.J. Fish General Contractors) (Respondents) (*Withdrawn*)

2721-87-R: International Beverage Dispensers' & Bartenders' Union of Hotel & Restaurant Employees' & Bartenders' International Union, Local 280 (Applicant) v. Pajelle Investments Ltd., and 41070 Ontario Ltd. (Respondents) (*Withdrawn*)

2791-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. S.I.R. Interiors Ltd., and Seaton Creative Interiors Ltd. (Respondents) (*Granted*)

3009-87-R: Dubreuil Brothers Employees Association (Applicant) v. Dubreuil Brothers Ltd., and Marcel Poulin (Respondent) (*Withdrawn*)

SALE OF A BUSINESS

2333-86-R: International Union of Bricklayers & Allied Craftsmen, Local 7 (Applicant) v. DMA Masonry Ltd., DeMartins (DMA) Inc., and DeMarinis Construction Ltd. (Respondent) (*Withdrawn*)

1879-87-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Joe Davis, Electric, Davis Electrical Contracting Ltd., and Sunset Electrical Contracting (Respondents) (*Granted*)

2720-87-R: International Beverage Dispensers' & Bartenders' Union of Hotel & Restaurant Employees' & Bartenders' International Union, Local 280 (Applicant) v. 410707 Ontario Ltd. (Respondent) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

2260-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Coca-Cola Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1728-87-R: Beverly Schultz and Wilma Vanlingen (Applicants) v. Ontario Public Service Employees Union (Respondent) (*Dismissed*)

Unit: "all employees of Double M.M. Janitorial Services Ltd. employed at the Ontario Polic College, Aylmer, save and except supervisors and those above the rank of supervisor" (13 employees in unit)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of ballots marked in favour of respondent	12
Number of ballots marked against respondent	1

2064-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) (*Withdrawn*)

2399-87-R: Stephen Lynott (Applicant) v. Int'l. Union of Operating Engineers & General Workers, Local 796 (Respondent) (*Granted*)

Unit: "all employees of Central Oxygen Ltd. in Ottawa, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (3 employees in unit)

Number of names of persons on list as originally prepared by employer	3
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

2551-87-R: Eddy Demers, on behalf of himself & a group of other employees (Applicant) v. The Office & Professional Employees' International Union, Local 225 (Respondent) v. Racine Robert & Gauthier Reg'd. (Intervener) (*Granted*)

Unit: "all employees of the respondent in the City of Ottawa and the City of Vanier, save and except managers and persons above the rank of manager" (20 employees in unit)

Number of names of persons on list as originally prepared by employer	20
Number of persons who cast ballots	15
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	15

3061-87-R: Jack Milligan (Applicant) v. United Food & Commercial Workers International Union, Local 1000A (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2297-87-U: SKD Manufacturing Division, SKD Co. (Applicant) v. Mario Dinardo, Robert Richardson and Al Wenner (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3332-86-U: Michael Alfred Jones (Complainant) v. International Association of Heat & Frost Insulators & Asbestos Workers Union, Local 95 (Respondent) (*Granted*)

3447-86-U: United Food & Commercial Workers International Union 175 (Complainant) v. Saan Stores Ltd. (Respondent) (*Withdrawn*)

0136-87-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Saan Stores Ltd. (Respondent) (*Withdrawn*)

0315-87-U: John Glykis (Complainant) v. Hotel Employees, Restaurant Employees Union, Local 75 (Respondent) v. Four Seasons Hotels Ltd. (Inn-on-the-Park) (Intervener) (*Dismissed*)

0537-87-U: United Steelworkers of America (Complainant) v. L.P. Systems Ltd. (Respondent) (*Withdrawn*)

1629-87-U: Canadian Union of Public Employees (Complainant) v. University of Toronto (Respondent) (*Granted*)

1756-87-U: Teamsters Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. 388685 Ontario Ltd., c.o.b. as Central Paving (Respondent) (*Withdrawn*)

1758-87-U: Marlene Gimblett (Complainant) v. General Motors of Canada Ltd. (Respondent) (*Withdrawn*)

1789-87-U: Michael Burkett, Mario Reale, Brian Price, et al. (Complainants) v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Union, Local 647 (Respondent) v. Ault Foods Ltd. (Intervener) (*Dismissed*)

1931-87-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Labourers' International Union of North America, Local 183, Bay-Tower Homes Co. Ltd., Bay-Tower Management Inc., Ledi Properties Inc., 518270 Ont. Ltd. and 554615 Ontario Ltd. (Respondents) (*Granted*)

1938-87-U: United Steelworkers of America (Complainant) v. Honey Bee Sanitation Inc. (Respondent) (*Withdrawn*)

1959-87-U: Great Lakes Fishermen & Allied Workers' Union (Complainant) v. Batista Fisheries Ltd. (Respondent) (*Dismissed*)

1960-87-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Unicel Ltd. (Respondent) (*Withdrawn*)

1989-87-U: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Complainant) v. Orocon Inc. (Respondent) (*Withdrawn*)

1998-87-U: United Brotherhood of Carpenters & Joiners of America, Local 3054 (Complainant) v. Dashwood Industries Ltd. (Respondent) (*Withdrawn*)

2021-87-U: London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Complainant) v. Kitchener/Waterloo Hospital (Respondent) (*Withdrawn*)

2063-87-U: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Complainant) v. M & K Plastics Ltd. (Respondent) (*Granted*)

2103-87-U: Int'l. Union of Operating Engineers & General Workers, Local 793 (Complainant) v. VMC Rentals (Respondent) (*Withdrawn*)

2107-87-U: United Steelworkers of America (Complainant) v. Allan & Marion Super Discount Marts Ltd. (Respondent) (*Withdrawn*)

2307-87-U: Christian Labour Association of Canada (Complainant) v. Salvation Army Eventide Home (Cambridge) (Respondent) (*Withdrawn*)

2309-87-U: Int'l. Union of Operating Engineers & General Workers, Local 793 (Complainant) v. Krause Enterprises (Eastern) Ltd. (Respondent) (*Withdrawn*)

2314-87-U: Allan & Marion Super Discount Marts Limited (Applicant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

2315-87-U: Ontario Public Service Employees Union (Complainant) v. Catulpa-Tamarac (Orillia) Child & Family Services Inc. (Respondent) (*Dismissed*)

2319-87-U: Gary St. Germain, and Hamilton Automatic Vending Co. Ltd. (Complainant) v. United Cement, Lime Gypsum & Allied Workers Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, and Joan Gilchrist, president Local 576 (Respondents) (*Dismissed*)

2426-87-U: Ontario Nurses' Association (Applicant) v. Metro Windsor-Essex County Health Unit (Respondent) (*Withdrawn*)

2553-87-U: William Douglas (Complainant) v. Humber College of Applied Arts & Technology (Respondent) (*Dismissed*)

2559-87-U: United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W. International (Complainant) v. The Oaks Inn (Respondent) (*Withdrawn*)

2579-87-U: Int'l. Union of Operating Engineers & General Workers, Local 793 (Complainant) v. Madeleine Mines Ltd. (Respondent) (*Withdrawn*)

2591-87-U: Union of Bank Employees, Local 2104 (Ontario), Canadian Congress (Complainant) v. Atlas & Civic employees Credit Union Ltd. (Respondent) (*Withdrawn*)

2646-87-U: Ontario Liquor Boards Employees Union (Complainant) v. Fort Erie Duty Free Shoppe Ltd. (Respondent) (*Withdrawn*)

2698-87-U: Harry Blay, Cumberland Clothing (Complainant) v. Paul Hecht, Cumberland Clothing (Respondent) (*Withdrawn*)

2713-87-U: Helen Papaspyros, Chrestina Scourby, Helen Spartalis (Complainants) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Respondent) (*Withdrawn*)

2719-87-U: International Brotherhood of Electrical Workers, Local 105 (Complainant) v. Dunmark Electric (Ancaster) Ltd., Construction Workers, Local 6, (CLAC) (Respondent) (*Withdrawn*)

2722-87-U: International Beverage Dispensers' & Bartenders' Union of Hotel & Restaurant Employees' & Bartenders' International Union, Local 280 (Complainant) v. Pajelle Investments Ltd., 410707 Ontario Ltd., and Philip Wynn (Respondents) (*Withdrawn*)

2729-87-U: Lloyd Fairman (Complainant) v. United Steelworkers of America, Local 2868 (Respondent) v. J.I. Case (Intervener) (*Dismissed*)

2741-87-U: Energy & Chemical Workers Union (Complainant) v. Southern Wood Products Ltd. (Respondent) (*Withdrawn*)

2839-87-U; 3458-87-U: United Brotherhood of Carpenters & Joiners of America, Local 93 (Complainant) v. Julius Pesnekker, Interior Wood Ltd., and Pannonia Woodworking Ltd. (Respondents) (*Withdrawn*)

2908-87-U: Teamsters Local No. 141, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. CHEF FOODS, division of Willett Foods Ltd. (Respondent) (*Withdrawn*)

2913-87-U: United Steelworkers of America (Complainant) v. Miller Fluid Power (Canada) Ltd. (Respondent) (*Withdrawn*)

2917-87-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC, Local 414 (Complainant) v. Wallaceburg IGA, Mrs. W. Spadafore, Mr. L. Spadafore, and Frank Chase (Respondents) (*Withdrawn*)

2925-87-U: L'union Internationale Des Employés Professionnels et de Bureau, Local 225 (Complainant) v. L'union du Canada Assurance-Vie (Respondent) (*Withdrawn*)

2929-87-U: Glass, Pottery, Plastics & Allied Workers International Union (Complainant) v. VS Services Ltd. (Respondent) (*Withdrawn*)

2939-87-U: Energy & Chemical Workers Union (Complainant) v. Rothsay, member of Maple Leaf Mills Ltd., Paris Plant (Respondent) (*Withdrawn*)

2950-87-U: Bill Erickson (Complainant) v. Quality Meat Packers Ltd., and United Food & Commercial Workers International Union, Local 743 (Respondents) (*Withdrawn*)

2959-87-U: Terry Martell (Complainant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC, Local 579 (Respondent) (*Withdrawn*)

2961-87-U: Graphic Communications International Union, Local 500M (Complainant) v. Globe Graphic Communications Inc. (Metropolitan Toronto) (Respondent) (*Withdrawn*)

2987-87-U: United Plant Guard Workers of America, Local 1962, North Plant (Complainant) v. General Motors of Canada Ltd., Oshawa (Respondent) (*Withdrawn*)

3090-87-U: Ontario Nurses' Association (Complainant) v. Spencer Brothers Nursing Home, and Standard Trust Co. (Respondents) (*Withdrawn*)

3095-87-U; 3097-87-U: Regal Envelope Inc. (Applicant) v. Canadian Paperworkers' Union, Local 300 of the Canadian Paperworkers' Union, et al. (Respondent) (*Withdrawn*)

3134-87-U; 3135-87-U: Ontario Public Service Employees Union (Complainant) v. St. Thomas-Elgin Association for the Mentally Retarded (Respondent) (*Withdrawn*)

3197-87-U: Michael F. Crowe, E.D. Dunlop, Gord Buxton, Balton Nielsen (Complainants) v. United Brotherhood of Carpenters & Joiners of America, and Ontario Hydro (Respondents) (*Withdrawn*)

3225-87-U: Dario Castellucci (Complainant) v. Canadian Auto Workers, et al., Local 444, Officers of C.A.W. Local 444, President K. Girard, Harvey Courtland, et al. (Respondents) (*Dismissed*)

3274-87-U: Vincenzo Di Pierro (Complainant) v. Community Services Dept. (Respondent) (*Dismissed*)

3279-87-U: Ian Ross Parsons (Complainant) v. Paraway Transport Ltd. (Respondent) (*Dismissed*)

3350-87-U: United Steelworkers of America (Complainant) v. A. Gold & Son Ltd. (Respondent) (*Withdrawn*)

3369-87-U: Canadian Union of Public Employees (Complainant) v. St. Vincent's Hospital (Respondent) (*Withdrawn*)

3415-87-U: John Derda (Complainant) v. Agrigento Co. (Respondent) (*Dismissed*)

3422-87-U: Daniel O. Nichols (Complainant) v. Structoglas Ltd. (Respondent) (*Dismissed*)

3428-87-U: Manual Casamiro (Complainant) v. Ted Williamson, Paul Judd, and Brian McLelland (Respondents) (*Dismissed*)

3429-87-U: Bob Flintoff (Complainant) v. Ted Williamson, Paul Judd, and Brian McLelland (Respondents) (*Dismissed*)

APPLICATIONS FOR EARLY TERMINATION OF COLLECTIVE AGREEMENT

2843-87-M: Work Wear Corp. of Canada Ltd. (Employer), and Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

1201-84-JD: United Brotherhood of Carpenters & Joiners of America, Local 1190 (Complainant) v. Labourers' International Union of North America, Local 183, Lakeview Estates Ltd., and 529126 Ont. Inc. c.o.b. as Trimar Construction (Respondents) (*Withdrawn*)

1740-87-JD: International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Complainant) v. G. Tari Ltd., Labourers' International Union of North America, Local 837, and Labourers' International Union of North America, Local 183 (Respondents) v. Heavy Construction Association of Toronto (Intervener) (*Withdrawn*)

2953-87-JD: Ontario Sheet Metal Workers' Conference (Complainant) v. Commonwealth Construction Co., Lorlea Steels Ltd., and United Brotherhood of Carpenters & Joiners of America (Respondents) (*Withdrawn*)

3146-87-JD: United Brotherhood of Carpenters & Joiners of America (Complainant) v. The Electrical Power Systems Construction Association, Ontario Hydro, Ontario Sheet Metal Workers' & Roofers' Conference, and Sheet Metal Workers International Association, Local 30 (Respondents) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0896-86-M: The Windsor Star (Applicant) v. Windsor Newspaper Guild, Local 239 (Respondent) (*Granted*)

1642-87-M: London Regional Art Gallery (Applicant) v. Canadian Union of Public Employees, Local 217 (Respondent) (*Withdrawn*)

2265-87-M: London & District Service Workers' Union, Local 220 (Applicant) v. Pinehaven Nursing Home (Respondent) (*Withdrawn*)

2453-87-M: Ontario Nurses' Association (Applicant) v. Community Memorial Hospital (Respondent) (*Withdrawn*)

3008-87-M: Dubreuil Bros. Employees Association (Applicant) v. Dubreuil Bros. Ltd. (Respondent) (*Withdrawn*)

3088-87-M: Ontario Liquor Boards Employees Union (Applicant) v. Fort Erie Duty Free Shoppe Ltd. (Respondent) (*Withdrawn*)

3211-87-M: Ontario Public Service Employees Union (Applicant) v. Kinark Child & Family Services (Barrie) (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

0650-86-OH: Ralph Gratton Jr. (Complainant) v. Boise Cascade Canada Ltd. (Respondent) v. Canadian Paperworkers Union, Local 306 (Intervener) (*Granted*)

2405-87-OH: Rupert Jaglal (Complainant) v. Olympia Floor & Wall Tile Co. (Respondent) (*Withdrawn*)

2801-87-OH: Tran, Xa Dieu (Complainant) v. Mirolin Industries Inc. (Respondent) (*Withdrawn*)

3362-87-OH: Phillis Melanson (Complainant) v. Interbake Foods (Respondent) (*Withdrawn*)

3372-87-OH: Worrick Russell (Complainant) v. The Board of Management, Metropolitan Toronto Zoo (Respondent) (*Withdrawn*)

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3157-86-M: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. R. G. Kirby Construction Ltd., and R. G. Kirby & Sons Ltd. (Respondents) (*Dismissed*)

1215-87-G; 1285-87-G: Labourers' International Union of North America, Local 597 (Applicant) v. Division Construction Ltd. (Respondent) (*Withdrawn*)

1623-87-G: Int'l. Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Vic D'Antimo, c.o.b. as V.M.C. Rentals (Respondent) (*Granted*)

2011-87-G: Ontario Allied Construction Trades Council on its own behalf & on behalf of United Brotherhood of Carpenters & Joiners of America, Lake Ontario District Council (Applicant) v. Electrical Power Systems Construction Association, and Ontario Hydro (Respondents) (*Granted*)

2093-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Adam Clark Co. Inc. (Respondent) (*Withdrawn*)

2126-87-G: Labourers' International Union of North America, Local 1089 (Applicant) v. Teperman & Sons Inc. (Respondent) (*Granted*)

2182-86-M; 2191-86-M: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 552 (Applicant) v. The Board of Education for the City of Windsor (Respondent) (*Granted*)

2528-87-G: Millwright District Council of Ontario, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Attic Mechanical Maintenance Ltd. (Respondent) (*Withdrawn*)

2583-87-G: United Brotherhood of Carpenters & Joiners of America, Local 446 (Applicant) v. Commonwealth Construction Co. (Respondent) (*Withdrawn*)

2671-87-G: The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 7 Canada (Applicant) v. Universal Ceramics (Respondent) (*Granted*)

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2971-87-G: International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. K & Z Construction Ltd. (Respondent) (*Granted*)

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3109-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. G.B. Smith Contracting Ltd. (Respondent) (*Withdrawn*)

3110-87-G: Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Domingo's Contractors Carpenters (Respondent) (*Withdrawn*)

3117-87-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen & Marble, Tile & Terrazzo Union, Local 31 (Applicant) v. Zeppa Tile Inc. (Respondent) (*Granted*)

3124-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. 615654 Ontario Ltd. (Respondent) (*Withdrawn*)

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3166-87-G: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Paul Martin Inc. (Respondent) (*Granted*)

3188-87-G: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Byrne Glass Enterprise Ltd. (Respondent) (*Granted*)

3191-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. L & F Excavating Ltd. (Respondent) (*Withdrawn*)

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3253-87-G: International Brotherhood of Electrical Workers, Local 105 of the IBEW Construction Council of Ontario (Applicant) v. Commonwealth Construction Co. (Respondent) (*Granted*)

3254-87-G: International Brotherhood of Electrical Workers, Local 105 of the IBEW Construction Council of Ontario (Applicant) v. Duke Electric (Respondent) (*Granted*)

3255-87-G: International Brotherhood of Electrical Workers, Local 105 of the IBEW Construction Council of Ontario (Applicant) v. I.C.S. Construction (Respondent) (*Granted*)

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3261-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. G.L. Trenching Ltd. (Respondent) (*Withdrawn*)

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3341-87-G: Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 200 (Applicant) v. Zimmcor Co. (Respondent) (*Withdrawn*)

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3366-87-G: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. David's Grovedale Construction Ltd. (Respondent) (*Granted*)

3382-87-G: Ontario Allied Construction Trades Council, and Int'l. Union of Operating Engineers & General Workers, Local 793 (Applicant) v. Electrical Power Systems Construction Association, and Ontario Hydro (Respondents) (*Withdrawn*)

3427-87-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Aveiro Construction Ltd. (Respondent) (*Withdrawn*)

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2254-86-R: United Food & Commercial Workers International Union (Applicant) v. Saan Stores Ltd. (Respondent) (*Withdrawn*)

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*Ontario Labour Relations Board,
400 University Avenue,
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ONTARIO LABOUR RELATIONS BOARD REPORTS



May 1988



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**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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3447-87-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. **Canada Blue Tanning Company Limited**, Respondent v. United Food and Commercial Workers International Union, United Food and Commercial Workers - Region 18, Canada, and Ontario Council of Leather Workers, Local 0-116, Cobourg, Intervener

Abandonment - Bargaining Rights - Certification - Collective Agreement - Incumbent union not applying terms of collective agreement while employer having financial problems - Whether 1983-85 collective agreement with an automatic renewal clause can act as a bar to certification application - Incumbent union not abandoning bargaining rights - Collective agreement acting as a bar - Certification application dismissed

BEFORE: Judith McCormack, Vice-Chair, and Board Members G. O. Shamanski and E. G. Theobald.

APPEARANCES: L. N. Gottheil, Maureen Kirincic and Richard Rollings for the applicant; Robert Dunn, Richard Beasley and Jack Braithwaite for the Respondent; Michael Church and Ian Reilly for the intervener.

DECISION OF THE BOARD; May 12, 1988

1. The name of the respondent is amended to read: "Canada Blue Tanning Company Limited".

2. These are two applications for certification brought by the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) ("CAW") and United Food and Commercial Workers International Union, United Food and Commercial Workers - Region 18, Canada, and Ontario Council of Leather Workers, Local 0-116, Cobourg ("UFCW") respectively, which the Board consolidated pursuant to section 103(3)(a) of the *Labour Relations Act*. UFCW also claims to be an incumbent union with a subsisting collective agreement, and as a result, it argues that the CAW's application is untimely and barred by the former's collective agreement. Its own application is brought without prejudice to this position. For its part, the CAW claims that the UFCW has abandoned its pre-existing bargaining rights, and that its new application is tainted by employer support. The CAW has also invoked section 8 in aid of its application for certification. Finally, there is a petition filed by employees in opposition to the UFCW, affirming their support for the CAW.

3. The parties were unable to agree on a procedure for hearing these matters. As a result, and after receiving their submissions, the Board ruled orally that the most expeditious manner of handling this case would be to hear and determine the issue of whether the UFCW had abandoned its bargaining rights and whether there was a subsisting collective agreement first. The parties then led evidence and made submissions on those issues, which this decision now addresses.

4. Clarence ("Bud") McIvor testified on behalf of the UFCW. Mr. McIvor started his working career in 1950 at the Cobourg tannery now occupied by the respondent, and he worked there in a variety of positions for 19 years. During this period, the tannery changed hands some five times with Robson-Lang Leathers Inc. acquiring the tannery in 1958 along with four other tanneries in Oshawa, Barrie, Kitchener and London. In 1969 Mr. McIvor joined the staff of the UFCW as a staff representative. In this capacity, he serviced locals of the UFCW or its predecessor at all five Robson-Lang plants as well as a number of other tanneries in Ontario. Each Robson-

Lang plant eventually was covered by a separate collective agreement. In the mid-1970's, the Robson-Lang plants in London and Oshawa closed down. It is clear that the Oshawa closure had particular significance in Mr. McIvor's mind, and goes some way towards explaining his subsequent actions. Prior to the closure, Robson-Lang had requested concessions from the local at the Oshawa plant, a request which the union rejected. After a resulting strike, Robson-Lang closed down the plant and 225 employees lost their jobs. This was followed by protracted litigation to obtain severance pay which only ended when the company went into receivership in the spring of 1985.

5. In March of 1983, the UFCW and Robson-Lang entered into the collective agreement at the Cobourg plant which the former now relies upon as a bar to these applications. This agreement covers the period March 1, 1983 to November 30, 1985 and contains the following article

Article 36 - Termination

36.01 This Agreement shall remain in full force and effect from the 1st day of March, 1983, until the 30th day of November 1985, and shall continue in force from year to year thereafter unless in any year not more than ninety days and not less than thirty days before the date of termination, either party shall furnish the other with notice of termination or proposed revision of the Agreement, Arrangements to commence negotiation will be made within fifteen days of the giving of the notice.

6. When Robson-Lang went into receivership in 1985, all employees were laid off at the three remaining plants except for one who was retained to maintain and service the machines during the shut-down at the Cobourg plant. The receivers deducted dues and applied the Robson-Lang Cobourg collective agreement to this employee until February of 1986. An adjustment committee was constituted to help place employees in other jobs and otherwise ease the effects of the plant closure, and Mr. McIvor sat on the committee along with company and government representatives. No buyer could be found for the Barrie plant which was bought eventually by the City of Barrie and torn down. The Kitchener plant was bought by a Toronto company and Mr. McIvor met with the buyer, who indicated he intended to hire some 20 employees. As a result, Mr. McIvor agreed to give the buyer a "free" year during which the Kitchener plant collective agreement would not be applied. After that year, a new collective agreement was signed and 40 employees are now working at the plant.

7. Meanwhile in Cobourg, the one remaining employee was laid off and the respondent entered into negotiations to purchase the tannery. Mr. McIvor knew Richard Beasly, the respondent's principal, because he had visited the plant previously in February of 1986. Mr. McIvor sent the following letters as a result of discussions between the two men:

Richard Beasly
1219 Northgate Crescent
Oshawa, Ontario
L1G 7C4

Dear Richard:

This is to confirm that 0116, Cobourg, has no liabilities against the old company of Robson-Lang, Inc., in Cobourg, as to do with money.

We have an Union agreement in force now, and for the future. The only outstanding issue is the Pension Plan, and is [sic] supposed to be cleared up by the end of February, 1986.

Yours truly,

(signature)

Clarence (Bud) McIvor

Richard Beasly
1219 Northgate Crescent
Oshawa, Ontario
L1G 7C4

Dear Richard:

As to our telephone conversation on Wednesday, February 12, 1986, this will confirm that we are going to have a meeting with you on Friday, February 21, 1986, about going over some of the things in our agreement for 0116, Cobourg. I will be there about 10:00 a.m.

Yours truly,

(signature)

Clarence (Bud) McIvor

8. In fact, the arrangement to meet with Mr. Beasly on February 21st fell through, and Mr. McIvor met with Tim Peake, the plant superintendent, on March 11th to review the collective agreement. The respondent's operations are different in some respects from those of Robson-Lang, and Mr. McIvor and Mr. Peake were examining the collective agreement with an eye to any modifications which might be necessary as a result. During 1986, Mr. McIvor attended the plant on 16 occasions at regular intervals, either to sit on the adjustment committee or to have discussions with Mr. Peake or Mr. Beasly. At some point in 1986, employees were hired by the respondent and by March of 1987, five or six people were employed in the plant.

9. In May of 1987, Mr. McIvor met with Mr. Beasly to discuss the application of the collective agreement. The gist of that conversation was that Mr. McIvor agreed not to enforce the terms and conditions of the collective agreement until the respondent was on a better financial footing. Mr. McIvor then spoke to one of the employees in the plant and advised him of the agreement. He also told him that the union would be waiving dues in the interim because employees were making so little in the way of wages. In total, Mr. McIvor attended at the plant on seven occasions in 1987. During this period, the number of employees gradually increased until by the end of 1987 the number was close to 20.

10. In the meantime, the UFCW was litigating the disposal of a surplus amounting to twenty thousand dollars in the collective agreement pension plan which had been wound up after the plant closure in 1985. That litigation is ongoing, and the parties are awaiting a hearing by the Ontario Pension Commission. Mr. McIvor retired from employment with the UFCW on March 1st, 1988. Shortly thereafter, the CAW brought its application, followed by that of the UFCW.

11. The parties agreed that the UFCW held bargaining rights for employees at the time it entered into the 1983-1985 collective agreement with Robson-Lang, and also that the respondent was a successor employer to Robson-Lang within the meaning of the *Labour Relations Act*. The UFCW conceded in addition that the collective agreement had not been applied to employees from February of 1986 to the present.

12. On the basis of the foregoing, the CAW argues that the UFCW has abandoned its bargaining rights, and hence the 1983-1985 collective agreement cannot act as a bar. Among other things, counsel points to the Board's jurisprudence which indicates that after two automatic renewals of a collective agreement, an onus shifts to the union to satisfy the Board that it has not abandoned its bargaining rights, and in this regard he notes the UFCW's admission that the collective agreement has not been applied since 1986. In his view, the collective agreement is so fundamental to the collective bargaining relationship that its non-application in these circumstances reflects an abandonment of bargaining rights. Counsel also points to section 59(1) of the Act which allows the Board to terminate bargaining rights where no notice to bargain has been given under section 53, and notes that it is not disputed that no notice to bargain was given in this case.

13. Counsel for the UFCW argues that his client's failure to apply the collective agreement is a fact which relates to the quality of representation provided (which he concedes might have been better) rather than indicating any abandonment of the bargaining rights. Section 59(1) does not apply in these circumstances, he argues, because the presence of the automatic renewal clause obviates the necessity of giving notice. In his view, Mr. McIvor's approach to labour relations at the respondent's plant was prompted by the vulnerability of the leather industry and a tenuous economic climate, and there was no indication that he had turned his back on the UFCW's bargaining rights or "walked away" from them.

14. In *Belleville and District Builders' Exchange*, [1963] OLRB Rep. May 114 the Board put forward the proposition that after two automatic renewals of a collective agreement, an evidentiary onus shifts to the union to satisfy the Board that it has not abandoned its bargaining rights. In this case, the automatic renewals are stated to be from year to year in Article 36, and thus two automatic renewals had taken place as of November 30, 1987, giving rise to the onus. On the basis of the evidence before us, however, we conclude that the onus has been satisfied. Mr. McIvor addressed labour relations with the respondent gingerly because of his previous experiences with the failure of businesses in the tanning industry. He testified that his plan was to allow the respondent to establish its business to some extent before insisting upon the application of the old collective agreement or negotiating a renewal. It was obvious that he felt that a cautious approach had been fruitful at the Kitchener plant, and that anything more forceful might well prove to be short-sighted. We are inclined to agree that many of the points raised by counsel for the CAW relate to either the quality of representation provided by the UFCW or the effectiveness of the particular strategy chosen by Mr. McIvor, and not to any abandonment of rights. It is evident that Mr. McIvor maintained consistent and regular contact with the respondent in his capacity as the UFCW's staff representative for the Cobourg plant, and that it was his intention, when he judged that the respondent was in a financially sound enough position, to re-negotiate the collective agreement. Whether or not this course of action was appropriate in labour relations terms is irrelevant; it does not reveal any intention to abdicate as the bargaining agent of the respondent's employees.

15. There may well be situations in which the quality of representation is so inadequate that it might lead to an inference that bargaining rights have been abandoned. Similarly, we share the view that the dormancy of a collective agreement may be a very significant factor in assessing whether such an abandonment has occurred. In the circumstances of this case, however, the totality of the evidence suggests otherwise. We conclude that the UFCW has not abandoned its bargaining rights.

16. There was no dispute that the 1983-85 collective agreement was valid during its initial fixed term. Thereafter Article 36 operated to continue the agreement in effect unless notice of termination or proposed revision was given. The facts before us indicate that no such notice was sent within the terms of Article 36. While Mr. McIvor's letter of February 14th setting up a meeting to

review the collective agreement might be characterized as a notice of proposed revisions of the collective agreement, it was not sent within the window stipulated in Article 36, and as a result, the automatic renewal mechanism was not deactivated. There was no dispute that as a successor employer, the respondent became bound by the agreement.

17. Counsel for the CAW argued that the bargaining rights could be terminated under section 59(1) because no notice under section 53 had been given. However, the Board has noted previously in *Kingston Terminal Restaurant*, 60 CLLC ¶16,163 that the purposes of section 59(1) would not be served by requiring such notice in the presence of an automatic renewal clause:

The manifest object of section 38 is to facilitate or promote collective bargaining for the purpose of renewing or negotiating a new collective agreement. Here the parties, by mutual agreement, have, apart from this statutory provision, provided a means whereby, if neither gives notice to the other, the agreement shall be renewed without any further collective bargaining on their part. The construction of sections 38 and 43(1) [now sections 53 and 59(1)] urged by Counsel for the Applicant would override and nullify this. It would in effect require the giving of notice and participation in further collective bargaining to renew or modify an agreement, the renewal of which the parties have already provided for by other means, solely for the purpose of ensuring that such renewal would operate as a bar to an application by the company for termination of the Union's bargaining rights. This construction is manifestly repugnant to one of the major objects of the legislation which is to enhance industrial peace and stability in collective bargaining and would result in an absurdity.

Without plain and inexorable language in The Act in support thereof, this Board cannot accept the Applicant's interpretation of sections 38 and 43(1) [now sections 53 and 59(1)] as reflecting the true intent of the legislature. Under the circumstances of this case there was no obligation on the part of the Union to give notice under section 38 [now section 53].

Moreover, if the automatic renewal clause did not take the place of such notice, the protection it offers would be largely vitiated, since notice under section 53 would terminate the collective agreement, and lack of notice would trigger section 59(1), enabling the Board to terminate the union's bargaining rights. In *Pinkerton's Canada Limited*, [1986] OLRB Rep. June 818 the Board recently adopted *Kingston Terminal Restaurant, supra*.

18. We find it somewhat troubling that the UFCW can decline to apply the terms and conditions of a collective agreement to employees and at the same time raise that very agreement as a bar to the organizing attempts of another union. However, the evidence before us does not suggest that Mr. McIvor and Mr. Beasly had terminated the collective agreement in its entirety. It was apparent both from Mr. McIvor's testimony and his letters of February 14, 1986, that he was relying on Article 36 to continue the collective agreement in effect. His arrangement with Mr. Beasly amounted to a temporary suspension of many, if not most, of the collective agreement's terms and conditions, but there was no suggestion that the duration or the recognition clause had been amended, or that Article 36 was modified.

19. Thus, the 1983-1985 collective agreement constitutes a bar to the applications before us which are accordingly dismissed. We note in passing that whether or not notice is given in accordance with Article 36, an open period is provided by statute under section 57(2)(c) in several months.

3042-86-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Can-Eng Metal Treating Ltd., Respondent v. Group of Employees, Objectors

Certification - Certification Where Act Contravened - Intimidation and Coercion - Membership Evidence - Representation Vote - Non-pay allegation substantiated - Board rejecting all cards collected by that collector but declining to reject Form 9 - Economic misrepresentation not leading Board to reject all membership evidence - Vote ordered

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members J. A. Ronson and D. Patterson.

APPEARANCES: Clare Meneghini, Wayne McKay and Bob Savard for the applicant; Brian P. Smeenk, Richard Ott and Reinhard Jabs for the respondent; Ron Prattis and Gary Prattis for the objectors.

DECISION OF THE BOARD; May 12, 1988

1. By decision dated March 20, 1987, a differently constituted panel of the Board made a number of findings and determinations with respect to this application for certification and directed that further hearings be held for the purpose of receiving "the parties' evidence and representations with respect to the voluntariness of the petition, the allegations of misconduct filed with the Board and all issues arising out of and incidental to the those matters".

2. When the matter came on for hearing before this panel, Board File No. 3220-86-U, a complaint under section 89 of the *Labour Relations Act* came on for hearing with it. Upon motion by the respondent, the Board ruled that the latter would proceed separately as follows:

There are two matters before the Board for hearing today. Board File No. 3042-86-R is an application for certification. Board File No. 3220-86-U is a complaint under section 89 of the Act in which the union alleges the respondent has breached section 79(2) (the freeze provisions) of the Act.

The respondent submits that it is not appropriate for the two matters to proceed together. Counsel argues that there is an insufficient nexus or overlap between the certification matter and the section 89 complaint to justify such a procedure. The applicant argues that the union intends to rely upon the alleged breach of section 79(2) to refute the respondent's allegations of impropriety on its part and to support its allegations that the petitions filed are not voluntary.

The certification matter first came on for hearing on February 27, 1987. In a decision dated March 20, 1987 arising out of that hearing, a differently constituted panel of the Board refers to the possibility of a section 89 complaint being filed by the respondent relating to the application for certification and directs that any such complaint be consolidated with the application now before the Board.

The respondent has chosen to make its allegations in the context of the certification proceeding rather than filing a separate complaint. Apparently there was some discussion of a possible section 89 complaint by the applicant

at the previous hearing, but there is no mention of it in the March 20, 1987 decision.

In our view, the section 89 complaint which has been filed by the union has been filed as though it is an entirely separate matter. Notwithstanding the reference in it to coercion, there are insufficient particulars to establish any relevant nexus between it and the certification matter. Further, the applicant has twice been asked for, and has twice given, particulars of its allegations in support of its assertion that it be certified either outright on the basis of the membership evidence filed, or, in the alternative, under section 8 of the Act. None of its particulars make any mention of a breach of the freeze provisions or the coercive effect thereof insofar as its application for certification is concerned. The applicant has had ample opportunity to make such allegations in both the certification proceeding and a section 89 complaint and has failed to do so.

Both section 72 of the Board's Rules of Procedure and section 8 of the *Statutory Powers Procedure Act* require that a party alleging improprieties by another fully particularize those. This requirement exists for both labour relations and legal reasons. The labour relations purpose is to try to ensure, as much as possible, that matters coming before the Board would be dealt with expeditiously. The legal basis is natural justice; that is, that the party against which allegations of misconduct are made be aware of the case it has to meet.

Consequently, we are satisfied that the respondent's position is correct and that it is not necessary, and would serve no useful purpose, to have these two matters heard together. Accordingly, the section 89 complaint will proceed separately and the Registrar is directed to so schedule it for hearing.

The Board also ruled that it would not entertain any evidence from the applicant with respect to matters that it had not properly particularized.

3. The parties agreed that the Board could accept as evidence in this hearing, the evidence given to the Labour Relations Officer in the course of her inquiry, and subsequently transcribed and included in her report to the Board, with respect to the duties and responsibilities of William Fulton and Erwin Vogel as authorized by the Board in its March 20, 1987 decision. Subsequently, in the course of the hearing, the applicant withdrew its challenges to the inclusion of Fulton and Vogel on the list of employees in the bargaining unit. The applicant also withdrew its challenge to the inclusion of Clarke Eady on the list of employees in the course of the Officer's inquiry.

4. In addition, the parties were able to agree to a description of a bargaining unit of employees of the respondent. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in Kitchener, save and except managers, persons above the rank of manager, office, sales, and technical staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. Having regard to the material filed and the agreement of the parties, the Board finds that there were 37 employees in the bargaining unit at the time the application was made.

6. In support of its application for certification, the applicant filed documentary evidence of membership in the form of 25 combination application for membership and attached receipt cards. Of these, 24 bear the names and original signatures of an employee in the bargaining unit

and the receipts, which are countersigned by a witness (the collector), indicate that a payment of \$1.00 has been made to the union in respect of membership within the six month period immediately preceding the terminal date set for the application. The cards and money were collected by more than one person and the membership evidence is supported by a Form 9 Declaration which attests to its regularity and sufficiency. On its face, and standing alone, the membership evidence filed demonstrates that the applicant has a level of support in excess of that required, section 7(2) of the Act, for certification without a representation vote.

7. However, there were also filed with the Board 11 statements of desire (or petitions, as these are commonly called) in opposition to the application. In all, these contain 28 signatures. However, there are 8 duplicate signatures so that only 20 different people actually signed the petitions, all of whom are employees in the bargaining unit. Of these, 9 were persons on whose behalf the applicant had submitted membership evidence in support of its application. The Board's treatment of petitions is such that it is those 9 signatures, which purport to indicate that those employees have had a change of heart and no longer wish to support the application, which are relevant to the Board's consideration and would, if proved to be a voluntary expression of the wishes of those employees, raise sufficient doubt concerning the amount of continued support enjoyed by the applicant on the terminal date to prompt the Board to exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote notwithstanding the amount of membership evidence filed by the applicant. (See *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138 at paragraphs 15, 16 and 17)

8. The applicant also filed 3 reaffirmations of persons who had previously signed both membership cards and a petition. However, even if proved voluntary, these could, in the circumstances, have no impact on the Board's considerations.

9. In addition, the applicant and respondent each alleged that the other had breached the Act. The applicant claimed that, should the Board not find that it was entitled to be certified on the basis of the membership evidence filed, the respondent had breached the Act in a manner such that the true wishes of the employees are not likely to be ascertained and that the Board should therefore certify it under section 8 of the Act. The respondent asserted that the applicant or its supporters had breached the Act in a manner such that the Board should give no weight to any of the membership evidence and dismiss the application or, in the alternative, direct the taking of a representation vote notwithstanding the applicant's level of membership support.

10. Finally, in the course of the hearing, the respondent alleged that Luis Wong Jr., one of the employees in the bargaining unit on whose behalf the applicant had submitted membership evidence, had not paid either \$1.00 or any other amount of money to the applicant, in respect of initiation fees or monthly dues, on his own behalf. The seriousness of this "non pay" allegation and its potential implications make it appropriate for us to deal with that issue first.

11. The object in certification proceedings is to determine whether a majority of the employees in the bargaining unit found by the Board to be appropriate for collective bargaining wish to be represented by the applicant trade union in their employment dealings with their employer. The *Labour Relations Act* is structured so that, except where a pre-hearing vote is requested, the certification of trade unions in this Province is based primarily upon an assessment of the trade union's membership support as evidenced by membership records filed in support of the application. The Board does not inquire into opinions of the virtues of trade union representations except as evidenced by the applicant's documentary evidence and any timely petitions filed in opposition to the application. In Ontario, as in most Canadian jurisdictions, the representation vote exists as a residual mechanism for ascertaining the wishes of the bargaining unit employees in

cases where either the applicant trade union does not have the support of more than fifty-five percent of the bargaining unit employees, which is necessary for outright certification under section 7(2) of the Act (but does have the support of not less than forty-five percent of them), or where the circumstances are such that the Board sees fit to direct that a vote be taken notwithstanding that there is documentary evidence showing membership support in excess of fifty-five percent. The Board's discretion in that respect must be exercised in a manner which is consistent with the legislated primacy of membership evidence as the means by which employee wishes are to be ascertained.

12. Accordingly, the Board relies heavily upon the membership evidence filed by an applicant trade union. Because of the consequences of the reliance that the Board places on what is a form of hearsay evidence which, pursuant to section 111(1) of the Act, is not usually disclosed to the employer or employees opposing the application and is not usually subject to cross-examination, the Board requires a high standard of integrity and precision in the nature and quality of membership evidence. In order to protect the integrity of a certification process which places heavy reliance upon what is essentially hearsay evidence of support for an application for certification, the Board requires trade unions to be scrupulous in the manner in which they conduct their organizing campaigns and obtain membership evidence. Accordingly, the Board must consider any substantial allegations which, if proved, might cast doubt on the reliability of membership evidence. Evidence of improper conduct by a trade union or its supporters may raise sufficient doubt as to whether that documentary membership evidence filed in support of an application for certification is a reliable indicator of employee support for the applicant to cause the Board to resort to the confirmatory evidence of a representation vote notwithstanding that the membership evidence shows, on its face, the union to have the support of more than fifty-five percent of the employees (see *Alderbrook Industries Limited*, [1981] OLRB Rep. Oct. 1331; *St. Michael Shops of Canada Limited*, [1979] OLRB Rep. April 346; *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611). In cases where improper conduct is established, the Board must assess the probable impact of that conduct on a reasonable employee having regard to the circumstances, including the nature of the particular workplace. The Board does not act as a censor of the social pressures which are commonly exerted for and against certification. As the Board noted in *Alderbrook Industries Limited*, *supra*:

13. Unfortunate as it may be, it is not uncommon for antagonism to be generated between employees who line up on opposite sides of a campaign for union representation. Statements by any person amounting to intimidation or coercion of an employee, whether they are made for or against a union, are clearly contrary to section 70 of the *Labour Relations Act* and are grounds for a complaint under section 89 of the Act. They may also form the basis for criminal charges. It does not follow, however, that the indiscretions of employees, whether they favour a union or sympathize with their employer, are to be held against the principal parties to an application for certification. The Board can no more hold against a union a verbal threat made to an employee's job security by an indiscreet employee who is neither a union officer nor a collector of union membership cards than it can hold against an employer similar threats made by a fervently anti-union employee acting on his own. Evidence of widespread threats which are made by neither the employer nor the union might, of course, cause the Board to resort to the further evidence of a representation vote.

13. Section 1(1)(l) of the Act provides that:

"member", when used with reference to a trade union, includes a person who,

- (i) has applied for membership in the trade union, and
- (ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and "membership" has a corresponding meaning;

In an application for certification, the Board must be satisfied that every membership card upon which an applicant trade union relies was signed by the employee on whose behalf it has been tendered and that each employee has paid the initiation fee or dues that must accompany it on his own behalf. This is accomplished by ensuring that documentary evidence of membership shows, on its face, that the employees to whom it relates have applied for membership in the applicant, and have paid to it, on their own behalf, at least \$1.00 in respect of initiation fees for monthly dues in it, and that the appropriate declaration attesting to the regularity and sufficiency of that membership evidence is filed. It is also desirable that the documents show the date on which any person to whom the application and payment was made, although this can be established using *viva voce* evidence. Accordingly, when it is alleged that some person(s) on whose behalf membership evidence has been submitted in support of an application for certification either did not sign the card, or did not make the requisite payment the Board conducts an investigation and, if necessary, a formal inquiry to determine whether there is any substance to the allegations and what effect, if any, should be given to the membership evidence.

14. Mr. Wong testified that he signed the application for membership card submitted to the Board by the applicant on his behalf. However, he stated that another employee, Rick Knight, had paid the dollar that accompanied the card to Richard Schwartz. He denied having paid any money to the applicant and stated that there had been no agreement or even discussion about him repaying Knight. Robert W. Savard, who signed Wong's card as the "collector", testified that he gave Wong a blank application for membership card which Wong subsequently returned to him, signed, together with \$1.00. Schwartz did not recall ever receiving any money from Knight, or anyone else, with respect to Wong's application for membership and he doubted that any such exchange took place. The Board did not have the benefit of Knight's testimony.

15. Savard, Wayne McKay (the Form 9 declarant), Neville White, and Schwartz all testified with respect to the card collection procedure adopted by the applicant in this case. Their testimony reveals that McKay, White, and Savard met at Savard's home during the evening of Friday, January 30, 1987 to discuss how they would go about attempting to organizing the respondent's employees. They decided that Savard, White, and Schwartz (even though the latter was not at the meeting) would approach the other employees. McKay, who is employed by the applicant as a "national representative", also explained that whoever signed as the collector of an employee's application for membership card should have observed the act of signing and received the \$1.00 payment with respect thereto from the employee concerned. He emphasized that employees must pay the money themselves. Subsequently, Savard explained this procedure to Schwartz.

16. Schwartz gave the cards and money he collected to Savard, who in turn passed them on, as he did the cards and money he said he collected, to White who then passed all of these, together with the ones he had collected, to McKay. For purposes of completing the Form 9, McKay made inquiries with respect to the collection of the cards and money of White only.

17. Savard was not a credible or reliable witness. His demeanour and aggressive attitude while on the witness stand showed him to be an excitable individual who is quick to anger. His conduct on the witness stand contradicted his words. For example, he testified that he never swears, either when angry or at all. Yet his testimony was liberally sprinkled with profanities. It was also clear Savard was prepared to go to any lengths to ensure that the applicant was certified. In addition, his testimony is riddled with internal inconsistencies and conflicts in many material respects with the evidence of witnesses, like McKay and White, both of whom we found to be credible and generally reliable. In one breath, Savard admitted that he had discussed with White and Schwartz the progress of their meetings with the respondent with respect to the 1987 wage increase for the

plant employees. In the next breath Savard denied having any such discussion or knowledge of what transpired at those meetings. Later still, he admitted that he used information about these meetings (although he altered it to suit his purpose) which he obtained from White or Schwartz to help him persuade other employees to sign cards. Savard also testified that he followed all of McKay's instructions regarding the collection of cards and money. However, he admitted that he approached employees during working hours and that Wong did not sign his card in his (Savard's) presence, both of which are directly contrary to those instructions. These examples are not exhaustive but do serve to illustrate the quality of Savard's testimony. In the result, we give no weight to any of it on any issue.

18. Schwartz testified in an honest and forthright manner. However, it was quite apparent that his recollection of many material events, including his participation in the applicant's organizing campaign, was often uncertain and incomplete. As a result, we are unable to accept as accurate any of his testimony which is not corroborated, in some way, but other reliable evidence.

19. Wong was not impressive in his demeanour as a witness. He also coloured some of his testimony in an effort to cast a more favourable light on his involvement in a lunch room coffee-throwing incident involving White and Schwartz (which incident we find to be irrelevant to any of our considerations herein). However, his testimony that he did not pay any money with respect to membership in the applicant was clear, unshaken on cross-examination, and uncontradicted by any reliable evidence. We accept that evidence.

20. In the result, we are not satisfied that Wong did in fact pay any money on his own behalf with respect to initiation fees in or monthly dues of the applicant.

21. What effect does this conclusion have on the applicant's membership evidence? Counsel for the respondent, supported by Ron Prattis on behalf of the objecting employees, argued that the non-pay, and what he submitted were serious defects in the inquiries upon which the Form 9 declaration was based, should cause the Board to give no weight to any of the membership evidence and that the application should be dismissed. In the alternative, he submitted that the Board should direct that a representation vote be held.

22. We have already explained that the Form 9 declaration is a formal attestation to the regularity and sufficiency of membership evidence. A Form 9 declarant warrants that the persons shown on the membership documents as being the collectors, were the persons who actually collected the money paid with respect thereto and that each person on whose behalf membership evidence is being submitted paid the money on his/her own behalf. As such, the Form 9 declaration is a check on the reliability of the membership evidence submitted in support of an application for certification. It is so important that the Board will give no weight to any membership evidence unsupported by one (see for example *Pietrangelo Masonry*, [1981] OLRB Rep. Feb. 218). Further, if it is revealed that a sufficient inquiry was not made by the declarant, or that the declarant failed to set out in it discrepancies of which s/he was or ought to have been aware, the Board will dismiss the application on the basis that the Form 9 is unreliable and that no weight can therefore be given to the membership evidence (see for example *Bond Place Hotel*, [1983] OLRB Rep. Feb. 202). It is not necessary that the Form 9 declarant have personal knowledge of the material facts to which s/he attests. It is sufficient for the declarant to inform her/himself by making the necessary inquiries of the collectors, or of persons who made the requisite inquiries of the collectors (see *Kitchener News Company Limited*, [1980] OLRB Rep. Nov. 1656).

23. In this case, McKay, the Form 9 declarant, had no personal knowledge of any of the facts material to his declaration. He obtained all of his information in that regard from White. White had personal knowledge of the membership evidence he had himself collected and passed

that on to McKay, together with information he received from Savard about the cards and money collected by Savard and Schwartz. This may not be an ideal way for a Form 9 declarant to inform her/himself. But it is acceptable. There is no suggestion in the evidence that any of McKay, White, or Schwartz conducted themselves improperly or that anyone in the chain passed on incorrect information. On the contrary, we are satisfied that, on the evidence before the Board, McKay made reasonable and sufficient inquiries for the purpose of making the Form 9 declaration and we therefore decline to reject it.

24. With respect to the membership evidence itself, we observe that the object of an inquiry into irregularities in such evidence is to determine what weight can be given to the impugned documents and to the membership documents filed with them (see *Dough Delight Ltd.*, [1986] OLRB Rep. May 603; *Olympia Floor and Wall Tile Company*, [1987] OLRB Rep. May 762). The effect of wrongful conduct will depend, in part, on the position, and degree of participation in the organizing campaign, of the individual(s) involved. The Board distinguishes between situations involving trade union officers or officials, employee organizers, and employee supporters of the trade union. Where union officers or officials have misconducted themselves, the Board will usually find itself unable to rely upon any of the membership evidence filed. In the case of employee organizers or supporters, the Board will generally give no weight to the card(s) in respect of which the irregularity is established and determine what weight is to be given to the remaining membership evidence on the basis of the nature and extent of the irregularity, and its probable effect on a reasonable employee (see for example *Websters Air Equipment Company Ltd.*, 58 CLLC ¶18,110; *Crock & Block Restaurant and Tavern*, [1980] OLRB Rep. Apr. 424; *N.A. Constructions*, [1982] OLRB Rep. Jan. 77; *Frankel Steel Ltd.*, [1984] OLRB Rep. Jan. 28).

25. In this case, it is clear that Wong's card must be disregarded. Savard is also shown as the collector on 4 other cards filed by the applicant 3 of which show the name of an employee in the bargaining unit. Having regard to the prominent role he played in the organizing campaign, his misconduct with respect to Wong's card, his apparent willingness to do anything to ensure that the applicant was certified, and his general lack of credibility, we find ourselves unable to rely upon membership cards collected by Savard and, accordingly, the Board will give no weight to any of them. However, Savard's misconduct does not give us cause to doubt the reliability of the balance of the applicant's membership evidence.

26. Accordingly, the applicant is left with 20 cards upon which the Board is prepared to rely, notwithstanding the misconduct of Savard. This represents a level of membership support below that required for certification without a representation vote and leaves the application in a vote position. We must, however, deal the respondent's allegations that there is reason to doubt the reliability of the membership evidence as a whole because of what it alleges was the improper conduct of Savard, Schwartz, and White in collecting it. More specifically, the respondent alleges that Savard, Schwartz and White all misrepresented the amount of the wage increase the respondent intended to give its employees for 1987 to assist them in persuading employees to sign applications for membership in the applicant, that Savard threatened and intimidated employees, and specifically Paul Ott, for the same purpose, and that Savard and another of the applicant's supporters, John Kasprick, intimidated and coerced employees who opposed this application.

27. Paul Ott testified that he was first approached to sign an application for membership in the applicant by White who, he alleged, told him that "everyone else" had signed. He testified that White "badgered him" to sign a card over a 2 day period. Paul Ott also testified that Savard asked him to sign a membership card and that, when he refused to do so, Savard became angry and started shouting that he wanted 100% support for the applicant, that he might as well sign because everyone else had, and that the applicant was already "in". Paul Ott made notes contemporane-

ously with the events he described. These notes are inconsistent with his *viva voce* assertion that White told him that all other employees had signed a membership card and we are not satisfied that White did so. Nor, in our view, was the salesmanship used by White, as described by Paul Ott, improper. Further, we observe that Paul Ott neither signed a card, nor felt threatened by either White or Savard and we find that Savard's actions were taken by Paul Ott to be the exaggerated claims of an excitable union supporter that they objectively were. Accordingly, the applicant's membership evidence cannot be impugned on that basis.

28. The Board heard a great deal of evidence about an incident in a lunch room which occurred either just before or shortly after the terminal date, February 17, 1987. Although there is a conflict in the evidence with respect to when the incident occurred, it is clear that Savard and Kasprick attempted to intimidate Ron Prattis, who led the opposition to this application, and his supporters, by threatening that "scabs" like him could suffer damage to their vehicles. The respondent operates a metal heat-treating plant for car and farm implement parts. It is hard work done by employees who are not easily intimidated. In our view, it is unnecessary for us to determine precisely when the lunch room incident occurred because the ill-advised and inappropriate comments of the applicant's supporters did not, in any case, exceed, the normal give and take of this particular workplace and, in all of the circumstances, including the atmosphere in which they were made, would not have deterred a reasonable employee of ordinary convictions (see *Kendall Co. (Canada) Ltd.*, [1975] OLRB Rep. Aug. 611). Indeed, there is no cogent evidence to suggest that it either was or was perceived to be any more than another outburst by the excitable Savard and one of his friends.

29. The respondent's other allegation is more serious. Manual Capa testified that the only reason that he signed an application for membership in the applicant was that Savard told him, in the presence of another employee Joe Weber, that the company was offering a 1987 increase of only 3% inclusive of wages and a uniform allowance. We have already indicated that we reject Savard's evidence in its entirety. Accordingly, Capa's evidence in this regard stands uncontradicted by any cogent evidence. Further, another employee, John McNeil, testified that he was under the impression, from talk in the plant, that the 1987 increase would total 3%. Finally, White, after first stating that he did not do so, admitted under cross-examination by counsel for the respondent that he did tell some employees that it appeared that the wage increase from the respondent "would be no better than the year before when we got 3%". The employees were generally aware that discussions were going on between the company and employee representatives, one of whom was White, with respect to a wage increase and there was no reason for them to doubt, at that time, what either White or Savard said in that respect. Insofar as Savard and White between them collected a large majority of the applicant's membership evidence, it seems likely that this misrepresentation pervaded the applicant's organizing campaign.

30. In circumstances where the Board has doubts as to the reliability of the membership evidence as an expression of the true wishes of the employees with respect to whom it is submitted because of the conduct of the applicant trade union, it may direct that a representation vote be taken on the basis that membership evidence must be free of any cloud or taint. In that regard, the Board has distinguished between salesmanship and improper conduct. The misrepresentation in this case does not amount to a threat to any person's employment (see *Waldorf Astoria Hotel*, [1981] OLRB Rep. Sept. 1308). Nor do we find it to amount to intimidation or coercion within the meaning of the Act. However, conduct need not amount to a breach of the Act to be improper for the purposes of impugning the reliability of membership evidence. It is sufficient if it amounts to a fundamental misrepresentation (see *Alex Henry & Son Ltd.*, [1977] OLRB Rep. May 288). In this case, the misrepresentation does not relate to union security, initiation fees, or dues obligations (see *Alex Henry & Son Ltd.*, *supra*; *Leon's Furniture Ltd.*, [1982] OLRB Rep. Mar. 404). It raises

no concern as to whether employees knew the membership evidence would be used in this application (see *Di-Al Construction*, [1982] OLRB Rep. Dec. 1822). Indeed, although we do not condone this sort of conduct, it really amounts to no more than a suggestion that the employees could do better if they had a trade union to bargain on their behalf and we find it to be within the bounds of salesmanship that both supporters of and opponents to an application for certification can be expected to engage in. Even if it did amount to improper conduct, it would not cause us to reject the membership evidence in its entirety. At most, a representation vote could be in order.

31. We must now consider the applicant's request for relief under section 8 of the Act. Certification pursuant to section 8 is an extraordinary remedy to be used only where a trade union is able to establish that there has been interference, intimidation, or coercion by an employer such that is not possible to ascertain the true wishes of the employees with respect to an application for certification (see *Ex-Cell-O Wildex Canada*, [1977] OLRB Rep. June 370; *Winson Construction Ltd.*, [1976] OLRB Rep. Nov. 714; and [1977] OLRB Rep. April 250; *Skyline Hotels Ltd.*, [1980] OLRB Rep. Dec. 1811). The nature of section 8 is such that no general rules or catalogue of circumstances that will lead to its application can be set down. In each case, the Board must examine the cumulative impact of an employer's conduct in the context of all the circumstances, including the nature of the workplace, as a whole.

32. The applicant did not seriously press its request for relief under section 8 of the Act. To the extent that it did so, it asserted that Richard Ott, the plant manager, acted in a manner which was contrary to the Act, and that his contraventions of the Act were such that the true wishes of the employees are not likely to be ascertained. In that regard, White recounted 2 discussions with Richard Ott. He testified that shortly after the end on the scheduled lunch break on February 5 or 6, 1987, Richard Ott approached him, threw up his arms up and angrily asked "where the fuck is everybody" and "you and the fucking union, I know you and Bob Savard are behind it. I'll fucking fix you." White allowed that a number of employees, including Bob Savard, had failed to return from lunch on time. He also testified that on February 12 or 13, 1987, Ott approached him again and asserted that he had just received a telephone call from a customer wanting to know if the respondent's employees were going on strike. White testified that when he denied saying anything like that, Ott said "one of your group did" and "if we lose I.S.M., 4 guys go too". White stated that when he asked if that was a threat, Richard Ott said "no but you had better watch your step". Robin Robertson testified that on February 6, 1987, Richard Ott told him that White and Savard would be "out the door 2 weeks after the union got in". He agreed that Ott appeared to be upset because a number of employees were late returning from lunch (as a result of which Ott had to some of their work) and that Ott indicated that such conduct would not be tolerated whether the employees were represented by a union or not. Richard Ott testified that he did have a discussion with White on February 6, 1987 in which he asked White, who works as a shipper's helper, to not tell either truck drivers or customers that the employees were going on strike because it could affect the company's business and accordingly everyone's job. He also testified that on another occasion he approached White and asked him where "the fuck" everybody was and that "this is fucking ridiculous" referring to the failure of some employees to return from lunch on time. He also testified that he told White, in a raised voice, to "tell Savard and his friends that whether there is a union here or not, I don't tolerate people coming back from lunch late and under the influence of alcohol". He admitted that he was very angry but denied making any direct comment about White or White's job security. Ott further admitted that when Savard, one of the delinquent employees, returned, he yelled at him and warned that "if there was a union, there or not, if he kept this up, I would fire him". Robertson was also late in returning and Ott testified that he warned him that "if it happens again I would fire you, whether there is a union or not" and that he told Robertson that "whether Savard is a union organizer or not, he would be the first to go" and

further suggested that Savard's conduct was such that he wouldn't last long whether or not the employees were represented by a union.

33. We find, White, Robertson and Richard Ott all to be credible witnesses. Having regard to the charged atmosphere in which the confrontations with respect to which they testified occurred and their different perspectives, it is hardly surprising that there are inconsistencies in the testimony of the three men. The common thread in the evidence, however, is that Richard Ott was concerned with the company's business and productivity, that he was provoked by the delinquent conduct of some employees (not White), and that the target of his anger and comments was the conduct of loose-lipped or delinquent employees, and that he was concerned, not with whether or not White, Savard, Robertson, or any other employee, was a union supporter, but with their conduct as employees irrespective of the presence of a union. Further, Ott's comments, though intemperate, did not exceed the limits of tolerance in this particular workplace. Further, we find that White was mistaken in asserting that Ott threatened "to fix" him and Savard because of their union activity, which comment is not consistent with the evidence as a whole. Even if Richard Ott did make such a statement, or his conduct could otherwise be construed to amount to a breach of the Act, we are satisfied that, in the circumstances of this case, they were not of the kind which creates a situation where the true wishes of the employees are not likely to be ascertained. Accordingly, the applicant's for relief under section 8 of the Act is dismissed.

34. In the result, the Board is satisfied that not less than 45% and not more than 55% of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on February 17, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

35. Accordingly, the Board directs that a representation vote be taken of the employees of the respondent in the bargaining unit found by the Board in paragraph 4 herein.

36. All employees of the respondent in the bargaining unit on the date hereof who are so employed on the date the vote is taken will be eligible to vote.

37. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

38. Because we have determined that a representation vote should be taken, it is unnecessary for us to determine whether the petitions filed in opposition to the application are voluntary.

39. The matter is referred to the Registrar.

3471-86-U Ontario Nurses' Association, Complainant v. Central Park Lodges, A Division of Trizec Equities Limited, Respondent

Change in Working Conditions - Duty to Bargain in Good Faith - Interference in Trade Unions - Unfair Labour Practice - All registered nurses at retirement lodge laid off - Replacement by registered nursing assistants - Lay off part of a larger economising measure - Lay off not motivated by anti-union considerations - Decision to reduce staff taken after collective agreement concluded - No breach of bargaining duty or freeze - Complaint dismissed

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members D. G. Wozniak and J. Sarra.

APPEARANCES: *Shalom Schachter, Jan Kainer, Marsha Sosiak, Florence Stanley, Eleanor Holroyd and Marie Morrison* for the complainant; *C. G. Riggs, C. L. Kay-Aggio, J. B. Rohrer and Kevin Roxby* for the respondent.

DECISION OF R. O. MACDOWELL, ALTERNATE CHAIR, AND BOARD MEMBER D. G. WOZNIAK; May 19, 1988

1. The reply to this complaint indicates that the correct name of the respondent is "Central Park Lodges, A Division of Trizec Equities Limited". The name of the respondent in the style of cause is amended accordingly.

I

2. The respondent employer operates a retirement lodge in London, Ontario. On February 27, 1987 the employer notified two full-time and four part-time registered nurses that they would be laid off. They were given four weeks notice. Their last day of work was March 27, 1987. Since these six employees were the only registered nurses working at the lodge, the layoff effectively eliminated the full-time and part-time bargaining units represented by the complainant union ("ONA").

3. ONA challenges the legality of the employer's actions on a variety of grounds. ONA asserts that the employer has breached its duty to bargain in good faith, because it did not notify the union in advance, and did not bargain about the decision to lay off the registered nurses working at the London Lodge. The union further asserts that the layoff is an unfair labour practice, motivated in whole or in part by the fact that the nurses in London have opted to join ONA and engage in collective bargaining. ONA maintains that the layoff also constitutes an unlawful lock-out. Finally, ONA argues that the employer has contravened the "statutory freeze" of employment conditions which must be maintained during the bargaining process. ONA relies upon sections 3, 15, 64, 66, 70, 72, 75, 76 and 79 of the *Labour Relations Act*, as well as sections 11 and 13 of the *Hospital Labour Disputes Arbitration Act*, should that statute be found to apply.

II

4. Central Park Lodges is a division of Trizec Equities Limited, which, in turn, is a corporate conglomerate engaged in a variety of business activities (including ownership of the Yorkdale Shopping Centre in Metropolitan Toronto). Central Park Lodges is itself divided into three separate sections: a Nursing Home Division, a Retirement Lodge Division, and a Home-care Division. There are 13 retirement lodges in the Retirement Lodge Division. Twelve lodges are located in Ontario and one is located in Quebec. In the Nursing Home Division, there are 3 nursing homes in Ontario and (it appears) one in the United States.

5. Central Park's *nursing homes* provide accommodation for senior citizens whose physical or mental state requires a significant degree of professional care and treatment. Persons are admitted to a nursing home only after an assessment by their doctors (often with the assistance of other health care professionals). All nursing homes must be licensed and receive funding from either the Ministry of Health or the Ministry of Community and Social Services. The *per diem* rate charged to the residents is fixed by government regulation. Approximately 55% of that rate is paid by OHIP. Licencing regulations govern the number, skill-mix and professional qualifications of staff, the resident/staff ratio, room size, lighting, number of residents per room, the mix of rooms (i.e. ward service, private or semi-private), room temperature, food temperature, water temperature, room size, bed size, bed location, performance requirements of the nurse-call system, location of the nurse-call system, etc. There is no right to strike. In the event of a collective bargaining impasse, the *Hospital Labour Disputes Arbitration Act* ("HLDA") requires that the dispute be submitted to arbitration.

6. According to Kevin Roxby, Vice-President of the Retirement Lodge Division, the purpose of the respondent's *retirement lodges* is to provide residential accommodation, shared facilities, and recreational programs for older persons who do not require the kind of care provided in a nursing home, but, by the same token, do not want the responsibility or inconvenience of maintaining their own homes. Unlike a nursing home, there are no licencing requirements or regulation by the Ministry of Health or any other government agency. In particular, there is no requirement for certain minimum hours of nursing care per resident, nor is there any regulation of the staff complement. Residents have keys and come and go as they please.

7. The Central Park retirement lodges are entirely "market driven"; that is, they provide a service to the market that the residents are willing to pay for. Typically there are larger rooms, higher quality furnishings, lighting which approximates a residential rather than an institutional setting, better food, and different educational or recreational programs because of the nature of the clientele. Subject to collective bargaining obligations, wages, staff-mix, and employment conditions remain the responsibility of the employer. The respondent's retirement lodges have never been regarded as "hospitals" under *HLDA* either by the Ministry of Health, the Ministry of Labour, or any other government agency. Indeed, some years ago there was a strike at the respondent's Windsor retirement lodge.

III

8. On April 30, 1984 ONA was certified to represent full-time and part-time bargaining units of registered nurses working at the employer's London lodge. These two bargaining units have always been very small. At the time of the events giving rise to this dispute, there were two full-time nurses and 3-4 part-time nurses. The other 38 employees at the lodge are represented by the Service Employees International Union ("SEIU").

9. There are several hundred employees in the employer's 13 retirement lodges. Quite a number of those employees are also represented by the SEIU. As of February 27, 1987, there were 70 registered nurses working in the 13 lodges; however, only the 5-6 nurses at the London lodge were unionized. In the employer's Nursing Home Division there are both ONA and SEIU bargaining units.

10. Following its certification, ONA gave notice to bargain. There followed a pattern of protracted negotiations stretching over 2-1/2 years. There were 28 meetings in all: 21 in respect of the agreement covering the two full-time employees, and an additional 7 meetings in respect of the part-time bargaining unit. A conciliation officer was appointed in August 1985. No "No Board"

report was ever issued, and accordingly, the parties have never been in a position to lawfully strike or lock out.

11. ONA's initial stance at the bargaining table was a demand for parity with nurses working in hospitals or nursing homes. That position was rejected by the employer. The employer maintained that its enterprise was not a nursing home or hospital, nor were the employees performing the same functions. The lodge was operating in an unregulated competitive market where the most appropriate bargaining benchmarks were the SEIU agreements at the London lodge itself. For the same reason, the employer resisted demands which would limit its ability to subcontract bargaining-unit work, inhibit the re-organization of staff, or prevent the transfer of functions ordinarily performed by nurses to other managerial or non-managerial employees. Its rationale was the same: it was involved in a competitive commercial activity and needed flexibility to develop its business and respond to the needs of the marketplace, which ultimately determined the staff requirements. Its revenues were derived solely from residents' fees. It had no government funding. There was no legal obligation or regulation requiring it to maintain any particular mix of staff or distribution of work functions (except in respect of a few duties which could only be performed by a doctor or registered nurse). The employer indicated that there were no plans for layoffs, and had been no layoffs in the past, but neither could there be any work guarantees. Eventually the parties reached agreements more or less along the lines of those already negotiated with the SEIU.

12. On September 23, 1986 the parties concluded and executed a "full-time" memorandum of settlement finally resolving all matters in dispute between them. On behalf of the employer, that agreement was signed (*inter alia*) by Kevin Roxby, Vice-President of the Retirement Division, and Joseph Rohrer, the employer's Director of Labour Relations. The memorandum of settlement is in the Ministry of Labour's standard form which includes the following preamble:

"The undersigned representatives of both the company and the union agree to the following basis of settlement of all matters in dispute as witnessed by the undersigned Conciliation Officer of the Ministry of Labour and agree to recommend its acceptance unanimously to their principals for ratification."

No further negotiations were contemplated, nor did any actually take place.

13. On October 7, 1987 an ONA representative wrote to the employer to advise that the nurses had ratified the memorandum of agreement on September 24th (i.e. approximately two weeks earlier). The terms of the agreement were implemented, and retroactive wages and benefits were paid. On December 10, 1986 Patricia Davey, secretary of the Local Union, advised the employer of its officers, and the members of the Grievance, Nursing, and Health and Safety Committees. Those committees included both full-time and part-time nurses.

14. On February 2nd and February 10th, 1987 there was an exchange of letters respecting typographical errors and other minor corrections to the text. According to Marsha Sosiak, there were also two telephone discussions with Rohrer to finalize the wording of the full-time agreement. She could not recall when they occurred. Those communications did not involve any further "negotiations". As far as the parties were concerned, the "deal" had been finalized, and all that was left was to "tidy up" the language.

15. Meanwhile the negotiations for the part-time agreement were ongoing. On January 28, 1987 the parties reached and signed a written settlement, recorded in the same Ministry of Labour format as is set out above. On behalf of the employer, the agreement was signed, *inter alia*, by J. B. Rohrer, the Director of Labour Relations. No further negotiations were contemplated nor did any take place.

16. By letter dated February 18, 1987, a representative of ONA notified the employer that the nurses had ratified the part-time agreement as of February 11th. Once again the employer proceeded to implement its terms. Barbara Holroyd, an ONA representative who had participated in the bargaining, testified that as far as she knew *both* the full-time and part-time agreements had been implemented. Ms. Holroyd testified that, as far as she was concerned, implementation implies employer ratification. In her view, there were binding agreements for both the full-time and part-time bargaining units.

17. Sometime in the week of February 23-27, Marsha Sosiak, another ONA representative, telephoned Rohrer, in Toronto, to clarify the status of the two agreements. According to Sosiak, Rohrer said that the full-time agreement had certainly been ratified and that he would check on the part-time agreement. Sosiak asked for a reply in writing. On Monday, March 2, 1987, Rohrer wrote a letter (received by ONA on March 6th) confirming that the employer had indeed ratified both agreements and, in the case of the part-time agreement was proceeding to process retroactive payments to the employees in accordance with its terms. Kevin Roxby testified that as far as the employer was concerned, the full-time agreement was ratified on September 23rd when he signed it. No other authority was required.

IV

18. It is important to recognize that we are dealing here with two full-time and three or four part-time nurses, occupying a single classification at one of 13 of the respondent's retirement lodges. There are 12 other lodges, 65 other nurses employed in the Retirement Division, and hundreds of other employees - many of whom are represented by the SEIU. In framing its defence, the employer urges the Board to take into account the larger business context.

19. Since 1986 the employer has been considering how best to exploit the market opportunity of an aging populace who are basically healthy, but may not want the responsibility of maintaining their own homes. These individuals need only incidental medical care and do not want to live in the regulated institutional setting of a nursing home. Indeed, because they do not require medical supervision or treatment, they might not even qualify for admission.

20. After some market research, a consultant's report, and discussions with senior and local managers, the Retirement Lodge Division decided to implement what was described as a "wellness concept". This involved, insofar as possible, creating a private residential setting, and de-emphasizing those aspects of the environment which had an institutional or hospital connotation, or involved the symbols of sickness. Some of the changes were cosmetic, such as eliminating nurses' uniforms and changing job titles (for example, "dietary supervisor" to "food and beverage manager"). Others were more significant, like refusing new residents who required post-operative care and shifting existing residents whose health had deteriorated into local nursing homes. The general objective was to attract and cater to an aged but healthy population who did not need medical treatment and could afford to pay for quality residential services.

21. Initially, there was no intention of eliminating registered nurses as a class, even though there had been some resistance to change among some of the nurses employed in the division. As late as February 9, 1987 Roxby met with Rohrer and Katharine Kinniburgh, Director of Operations, to explore alternative staffing patterns (including the use of RNs, RNAs and graduate nurses) as the "wellness concept" was implemented over the next couple of years. By definition, residents who were "well" would not need professional care. The discussion touched both on the possibility of eventually eliminating registered nurses and RNAs altogether, and on lesser steps such as a realignment of hours and duties. After examining these alternatives, the potential impact

of resident loss, the need to hire other qualified staff, and the relationship with the SEIU, it was decided to maintain the status quo. There was no economic reason to do otherwise.

22. Throughout the fall of 1986 and the early winter of 1987, Roxby was optimistic about the performance of his division. The lodge in London was losing money but, overall, the division was profitable. The fiscal year ending October 31, 1986 had been satisfactory, and occupancy for the division was relatively high. In December and January there was a dip in occupancy, but Roxby was not unduly worried because they were traditionally slow months. The wage bill was quite high but so was the occupancy level.

23. *On February 20, 1987* Roxby met with the President of Central Park Lodges, the Senior Vice-President of Finance and the Comptroller. His counterpart in the Nursing Home Division was also present. The purpose of the meeting was to discuss the first quarter financial review which the Comptroller had just prepared and would soon be forwarding to the Trizec head office in Calgary.

24. From Roxby's perspective, those figures proved to be alarming. If the trend continued, the Retirement Lodge Division would see operating income for the fiscal year at \$800,000 to one million dollars below budget. The respondent would not meet the income and profitability targets expected by its parent corporation.

25. The President told Roxby to "fix it". He did; and, with the benefit of hindsight and actual information (rather than projections) available by the time of these hearings, Roxby was able to testify that without taking the action he did, the division would have been one million dollars under budget by August 1987. Ironically, it appears that the financial crunch may have been caused to some degree by the implementation of the "wellness concept", and an outflow of residents from the 13 retirement homes to local nursing homes without a corresponding influx of new healthy residents.

26. Because the shortfall was mounting, Roxby considered it imperative to move quickly. There was little latitude with respect to fixed costs (mortgage payments, utilities, etc.) or in the food budget. He did not think an increase in residents' fees was feasible because there had already been a 5.7% increase in January. A further fee increase might drive away more residents and exacerbate the situation. Seventy per cent of the operating budget consisted of wages, salaries and benefits. Roxby concentrated in that area.

27. The nature, cost implications and implementation of the "cutbacks" were all explored with the assistance of a computer, so that projections and alternatives could be explored on a screen and produced as "spread sheets" for examination. Roxby concluded that it was necessary to undertake a staff re-organization across the whole retirement lodge network, and in the Nursing Home Division as well - although in the nursing homes there was less flexibility because of the regulations regarding staffing levels. There was also retrenchment in the nursing home operation in the United States.

28. This economising eventually resulted in the layoff of all 70 nurses in the 13 retirement lodges, together with a realignment of functions and a reduction of staff or hours for many other employees in the division. In some cases this could result in an increase of the number of bargaining-unit members in a unionized facility because RNAs, aides, guest attendants or other staff who replaced RNs or RNAs would typically all be represented by the SEIU. In London, virtually all functions formerly performed by the registered nurses are now being performed by RNAs, except injections which are administered, as required, by the Residential Services Manager (who is an RN) or a visiting doctor or a V.O.N. visiting nurse. It should be noted, however, that this change is not inconsistent with the "wellness concept" and the direction in which the employer was already

heading. Prior to the layoffs, residents who required anything other than a minimal degree of nursing care either had to make their own arrangements with private nursing services or move to a nursing home.

29. *On Monday, February 23rd*, Roxby went over his plan with Kinniburgh and David Mayh, the Senior Director of Human Resources. Rohrer had not attended the meeting of February 20th and was not available to attend the meeting of February 23rd. On February 25th the managers of the local lodges were assembled in Toronto to discuss the proposed changes. They were neither comfortable with, nor enthusiastic about the proposals, but could suggest no better alternatives. Roxby testified that if the local managers had predicted a serious potential impact on the occupancy rates, he would have scrapped the plan and explored other possibilities for cutting costs. But they did not. There is no doubt that the registered nurses were skilled and valued employees but they were performing functions which did not have to be done by an RN, and their elimination was one way to readily reduce the wage bill in the 13 lodges.

30. According to Roxby, no one thought about the two full-time and four part-time nurses in the London facility until Wednesday, February 25th, when the London manager drew their presence to his attention. The matter arose in the context of a discussion about the implementation of Roxby's plan in light of the existing SEIU agreements in the division. Roxby testified that he really hadn't thought about the two ONA units before, and certainly had not tailored his strategy with them in mind. He did not lay off 70 employees, and juggle the schedule of dozens of other employees, to penalize or undermine the rights of two full-time and 3-4 part-time nurses in London.

31. Rohrer, the Director of Labour Relations, did not learn of the financial difficulties or the action plan until February 26th. The unions were advised and meetings convened on Friday, February 27th. Both ONA and the nurses it represents were notified of the layoff to take effect four weeks later.

32. With this outline of the facts, we turn to the provisions of the *Labour Relations Act* upon which the complainant relies.

V

Sections 3, 64, 66, 70, 72, 75 and 76 of the Act

33. Sections 64, 66 and 70 appear in that portion of the Act which the Legislature has entitled "unfair labour practices". Their purpose is fairly obvious. Freedom of association and collective bargaining are fundamental concepts in our system of labour relations. Those rights would be rather hollow without effective remedies for their infringement. That is the purpose of the unfair labour practice sections of the Act. The "lockout" restrictions (sections 72, 75 and 76) play a similar role, but focus more narrowly on a particular kind of employer conduct: the suspension or elimination of work opportunities, with a view to forcing employees to give up statutory rights or agree to particular terms and conditions of employment. (See *Harry Woods Transport Ltd.*, [1976] OLRB Rep. July 341 and *Rondar Services Ltd.*, [1977] OLRB Rep. Oct. 655.)

34. In applying sections 64, 66 and 70 to a termination of employees, the Board must determine whether the reasons given for that termination are the *only* reasons, and whether they are tainted, *in any way*, by either anti-union considerations, or a desire to undermine or deprive employees of their statutory rights. The improper motive need not be the only or even the dominant one. It is sufficient if it was in the mind of the employer and one of the grounds for the action taken (see *R. v. Bushnell Communications Ltd. et al* (1973), 1 O.R. (2d) 442 (H.C.J.), affirmed at 4 O.R. (2d) 288 (H.C.A.); and *Westinghouse Canada Ltd.*, [1980] OLRB Rep. April 577, aff'd by

the Ontario Divisional Court at 80 CLLC ¶14,062). The appearance of a legitimate economic or other reason for the action taken will not necessarily exonerate an employer if it can be established that there *also* existed an illegitimate reason. Accordingly, it is imperative to carefully scrutinize all of the circumstances of the case, in order to ascertain not only what the employer did and its impact upon employees, but also why the employer chose that action at that time. In the case of an alleged lockout, the question is whether the denial of work opportunities is being used illegitimately as an instrument to exact concessions from the employees.

35. In the instant case there is no doubt about the impact of the employer's decision to reorganize its business: two full-time and 3-4 part-time nurses' positions were eliminated at the London lodge. That, in turn, amounts to an elimination of the two ONA bargaining units and the replacement of registered nurses by RNAs, other employees represented by the SEIU, or, in the case of certain functions, members of management, visiting physicians, or private nurses hired by the residents, privately, on an as-needed basis. From the point of view of the nurses in London, the results were traumatic. For the first time in years, they faced the spectre of unemployment.

36. However, we do not think that the situation at the London lodge can be viewed in isolation. The staff reduction in London was but a small part of a much broader process of reorganization, extending across the whole Nursing Lodge Division, and, to a lesser extent, into the Nursing Home Division. That reorganization was prompted by a desire to cut costs as quickly and efficiently as possible, and the documentary evidence filed with the Board supports the employer's view of the need to take immediate affirmative action. There is no evidence that such action was aimed at undermining ONA's bargaining rights in London; and it is highly improbable that Roxby would eliminate 70 nursing positions in 13 lodges, and alter the duties or hours of work of dozens and dozens of other employees, in order to camouflage an anti-union attack on 5 or 6 nurses in the London lodge. Indeed, Roxby testified that in exploring alternative cost-cutting measures, he never even thought about the 5-6 organized nurses in London. Their presence only came to his attention on February 25th, at the meeting with the local lodge managers. We accept his evidence on this point.

37. Likewise the evidence does not establish that the termination of the 5-6 London nurses was a device to induce them to give up rights or agree to particular terms of employment; nor was that decision undertaken in response to a bargaining position taken by those nurses. The reorganization plan was an irrevocable decision undertaken to correct perceived imbalances in the *system as a whole*. Its impact on the 5-6 ONA members in London was merely incidental; and, in their case, had the employer wanted to precipitate a lockout, it could easily have done so, legally, by merely refusing to agree to the union's proposals and requesting a "No Board" report. Since the London lodge was losing money in any event, that would have been the more likely response if the employer's concerns were as narrowly focused as the union now suggests. Once again, it seems highly unlikely that the employer would make significant changes in the work distribution and employee complement in 13 lodges and 3 nursing homes in order to exact concessions from a small group of full-time and part-time nurses in London. And, in fact, no such concessions were ever sought.

38. We do not think Roxby's decision was motivated in whole or in part by anti-union considerations, nor do we think that the elements of a lockout have been made out.

VI

Section 15 (Duty to Bargain in Good Faith), Section 79 (The Freeze)

39. Before considering the application of sections 15 and 79 to the facts at hand, it may be useful to briefly examine their content.

40. Section 15 obliges the employer to bargain in good faith and make every reasonable effort to make a collective agreement. As part of that bargaining obligation, the employer is required to provide information necessary for the union to make informed decisions on outstanding bargaining issues. In appropriate circumstances, an employer's obligation will extend to the *unsolicited disclosure* of certain kinds of business information critical to both the union and the job interests of the employees it represents. In *Westinghouse Canada Ltd.*, [1980] OLRB Rep. April 577, application for judicial review dismissed [1980] CLLC ¶14,062 (Div. Ct.), the Board put it this way:

Similarly can there be any doubt that an employer is under a section 14 [now s. 15] obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of a trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the content of the bargain.

41. On the other hand, the Board has been hesitant to extend that obligation to "plans" or other "possibilities" which have not crystallized into concrete decisions. In *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411 the Board reasoned:

On the other hand, plans and decisions to close a plant can effectively extinguish a bargaining unit and the relevance of the usual terms of a collective agreement. In this context, where a decision to close is announced "on the heels" of the signing of a collective agreement, the timing of such a significant event may raise a rebuttable presumption that the decision-making was sufficiently ripe during bargaining to have required disclosure or that it was intentionally delayed until the completion of bargaining. It can be persuasively argued that the more fundamental the decision on the workplace, the less likely this Board should be willing to accept fine distinctions in timing between "proposals" and "decisions" at face value and particularly when strong confirmatory evidence that the decision-making was not manipulated is lacking. This approach is sensitive to the positive incentive not to disclose now built into our system, and the potential for manipulation. Indeed, a strong argument can be made that the *de facto* decision doctrine should be expanded to include "highly probable decisions" or "effective recommendations" when so fundamental an issue as a plant closing is at stake. Having regard to the facts in each case, the failure to disclose such matters may also be tantamount to a misrepresentation. We might also point out that there are decisions taken because of costs which really ought not to be made until the underlying problem is discussed with the union to see if adjustment can be made and the decision avoided. However, for the reasons discussed above, we are not willing to adopt the *Ozark Trailers* test of "thinking seriously" for unsolicited disclosures as urged upon us by the complainant. The failure to reveal such "possibilities" as a general matter is not tantamount to a misrepresentation and therefore lacks the bad faith rationale developed in *Westinghouse* justifying unsolicited disclosure. The purpose of such information would be investigative and to facilitate the rational discussion purpose of the bargaining duty. Accordingly, the purpose of the information and the difficulties detailed above with unsolicited disclosure militate against any substantial expansion of the unsolicited disclosure obligation as elaborated to date. The interests of employees are real but the Board is not ignoring these interests by requiring a questioning approach to disclosure as a general matter. The position urged upon us by the complainant has too much potential for "greater heat than light" at the bargaining table. There is already enough uncertainty over precisely how significant and what nature a decision must be to trigger the

unsolicited disclosure duty. Unsolicited disclosure must be understood to be exceptional and centred essentially on a bad faith rationale.

It remains for the Board to determine in each case whether a particular business initiative is of such character as would require disclosure under the *Westinghouse* test and whether it has progressed beyond the point of plan or contingency to the stage of decision and implementation. If such decision has *effectively* been made, and it is probable that it will be implemented during the currency of a proposed collective agreement, then the duty to bargain in good faith requires its disclosure.

42. Section 79, the so-called “statutory freeze” preserves the *status quo* of the employment relationship while the process of bargaining is ongoing, until either the right to strike accrues, or the parties conclude a collective agreement. The employer is obliged to maintain “business as usual”; that is, to carry on business in accordance with its own past practice and its employees’ reasonable expectations. Any deviation from that pattern requires the consent of the employees’ bargaining agent, or must be postponed until the freeze is dissolved either by the accrual of the right to strike/lockout, or the signing of a collective agreement (in which case that document governs the parties’ rights). For our purposes, it is important to note that the section 79 “freeze” and the bargaining duty are coterminous: both are triggered by the notice to bargain, and both terminate upon the conclusion of a collective agreement.

43. We have no difficulty in concluding that the staff reorganization undertaken by the employer falls within the parameters of *Westinghouse* and *Consolidated Bathurst*. Roxby’s decision involved a major staff reorganization in the Retirement Lodge Division, effectively eliminated the ONA bargaining units, and entirely negated two and a half years of collective bargaining. Furthermore, it is conceded by the employer that if the “freeze” was still in effect, the unanticipated layoffs would constitute a breach (see *Simpsons Ltd.*, [1985] OLRB Rep. March 469 and April 594). The question, though, is when the decision was made, and when (if at all) the freeze and bargaining duty were terminated by the conclusion of a collective agreement.

44. The only evidence before the Board concerning the timing of the employer’s decision comes from Kevin Roxby, the effective decision-maker. Roxby testified that he had given consideration to the possibility of staff changes in conjunction with the eventual full implementation of the “wellness concept”, but no decision had been taken in that regard because of resistance by his own subordinates and the perceived difficulties involved in changing the staff mix. As late as February 10th there was no decision or plan to eliminate nurses or otherwise reorganize staff in the retirement division. The catalyst for change was the quarterly financial review discussed for the first time on February 20, 1987, and the company President’s injunction to take immediate steps to cut costs and bring the division budget into line with the financial targets set by Trizec, the parent company.

45. In this regard, we are satisfied that Roxby was a candid and credible witness. His version of events is also supported by the financial documents filed with the Board. There is no evidence to contradict or qualify Roxby’s testimony, and it is to his credit that he was forthcoming about the discussions with his staff early in February. While one cannot ignore the fact that the decision was taken around the time the negotiations with ONA were coming to a conclusion, neither can one ignore the fact that (in our view) the reorganization decision was entirely unrelated to that bargaining process. It was a response to a systemic problem (real or perceived), not a reaction to the collective bargaining situation of the 5 or 6 nurses in London. Unlike the situation in *Westinghouse* or *Consolidated Bathurst*, we cannot conclude that the employer was intentionally “keeping the union in the dark” or withholding information, known to be relevant, until the collective agreement was executed. We accept Roxby’s submission that he did not even consider the situation in London until February 25th when the local manager drew his attention to the two ONA

units in the London facility. Having regard to the totality of the evidence, we find that the decision to reorganize the staff complement and working hours within the Retirement Lodge Division was taken on February 23, 1987 and finalized on February 25, 1987, and that there was no consideration given to the situation of the ONA units in London.

46. Were there collective agreements in place when this decision was made, or were the bargaining duty and the freeze still operative? That determination requires a brief consideration of the status of a memorandum of settlement and the requirement of ratification. In *Graphic Centre*, [1976] OLRB Rep. May 221, the Board discussed those matters as follows:

The parties to collective bargaining do not normally execute a formal document until some time after the bargaining process has been completed. The process is one wherein the agreement of the parties is reduced to a memorandum of settlement subject to ratification by the respective principals which is then followed by the drafting and execution of the formal document. It would not be sound industrial relations policy to require as a condition of entering into a collective agreement the execution of the formal document thereby precipitating an often prolonged extension of the open period. The parties, however, must know, with a high degree of certainty and predictability, precisely when they have entered into a collective agreement so as they may properly assume their respective duties and responsibilities and conduct themselves in a manner consistent with the existence of a subsisting collective agreement. It should be added that certainty in this regard minimizes the amount of "litigation" which might otherwise come before the Board.

The Board has long held that a collective agreement need not be a single formally executed document but may by proper reference incorporate any number of other documents.... The Board has consistently held, however, that implicit in the statutory definition of "an agreement in writing" is the requirement for *signatures* which evidence the agreement of the parties and the conclusion of the bargaining process.... The Board in accord with the statutory definition requires signed evidence of the agreement of the parties and in the absence of such evidence cannot find that the bargaining process has ended and that a collective agreement exists. This is not to say, however, that the signatures must appear on the formal document but rather that there must be a signed document which sets out the agreement of the parties and which, if stipulated, has been ratified thereby completing the bargaining process....

In a number of cases the Board has been faced with situations where the parties have signed a memorandum of settlement subsequent to which confusion has arisen as to whether ratification has occurred. In certain of these situations the Board has responded to the extrinsic evidence and drawn the inference that ratification has occurred without there being signed evidence of this fact.... In other similar situations however the Board has stated that the parties must signify their ratification of the memorandum in writing ... in order for there to be a collective agreement within the meaning of the Act. Although each case must be considered within its own circumstances a signed memorandum of settlement coupled with *compelling* evidence of ratification must be considered by the Board as evidence of a collective agreement within the meaning of the Act. Whereas a Memorandum of Understanding subject to ratification is not a collective agreement ... evidence which clearly establishes that ratification has occurred elevates the memorandum to the status of a collective agreement within the meaning of the Act. Ratification satisfies the condition precedent thereby giving rise to what is then an unconditional agreement in writing (i.e. signed by the parties) on all outstanding matters. Although signed evidence of ratification is perhaps the most satisfactory evidence in this regard, the Board cannot ignore other evidence which supports the singular inference that ratification has occurred. It should be added that if the Board were to require signed evidence of ratification in all cases it would be denying the parties use of the equitable doctrine of estoppel in those situations where there is evidence of ratification, other than signed notification which has been relied upon by one or the other of the parties.

Ratification, then, is essentially a question of fact determined on the basis of the evidence before the Board in particular cases.

47. In the private sector though, ratification is not really a "two-way street" - despite the

terms of the Ministry of Labour document. Where a private sector employer sends a senior official to the bargaining table, the union is entitled to assume that such official has the authority to bargain and conclude a memorandum of agreement on behalf of the employer, and further that only the most extraordinary circumstances would warrant the employer's representative returning to the bargaining table with the message that the agreement had been repudiated by "his principals". In the private sector, unions expect, and are entitled to expect, that when a senior company official endorses a settlement, that agreement will be honoured by the employer and implemented in accordance with its terms as soon as the employees have signified their acceptance. In practice, the relationship between the employees and their statutory bargaining agent is quite different from the relationship between the employer and those of its officials designated to conduct bargaining on its behalf. (The situation might well be different where an employer retains a professional negotiator, or in the case of school boards, municipalities, or other entities where significant decisions may have to be ratified by some elected governing body.)

48. That difference was highlighted in this case by the evidence of Kevin Roxby who indicated that, as far as he was concerned, the proposed agreement was accepted by the company when he signed it. No further "ratification" was really required. Indeed, apart from present difficulties, we think that the union would have been understandably concerned if, having negotiated and signed a memorandum of settlement, the employer had subsequently rejected it. Certainly, in the present case, no such rejection was contemplated or in fact occurred. The union anticipated that once its members ratified the bargain, the employer would proceed to implement it - as the employer in fact did.

49. In the instant case the full-time memorandum of settlement was signed by both parties on September 23, 1986. The settlement was the culmination of months and months of negotiations. Both parties considered it to be a final and complete resolution of all matters in dispute between them. No further negotiations were contemplated, and the settlement was ratified by the trade union the following day. Ratification was confirmed by letter dated October 7, 1987. Roxby testified that the agreement was ratified, from the company point of view, when he signed it. The terms of the agreement were implemented. Subsequent correspondence was concerned solely with typographical or other minor errors in the text. In a telephone conversation some time in the week of February 23rd, Rohrer confirmed that the agreement had indeed been ratified some time before.

50. We are satisfied that the full-time agreement was in place at the time of Roxby's decision to reorganize the staff complement in the Retirement Division, and that, accordingly, there was no breach of either section 15 or section 79 of the *Labour Relations Act*. When the decision was taken, the full-time agreement was in place, and both the "freeze" and the "bargaining duty" had expired.

51. The situation concerning the part-time bargaining unit is more problematic - probably because no one was paying much attention to the position of three or four part-time nurses at the London lodge, and, as we have already mentioned, ratification of their collective agreement was, from the employer's point of view, a "pro forma" exercise. Their memorandum of settlement was executed on January 28th and ratified by the nurses on February 11, 1987. The employer was advised of that ratification about a week later by letter dated February 18, 1987. In the week of February 23rd, Ms. Sosiak inquired about the status of the part-time agreement and was advised, in writing, by letter dated March 2nd, that it too had been ratified. The employer implemented the agreement as it had undertaken to do, paying such retroactive pay or other benefits as might be required - all without protest from ONA. In fact, no layoff of part-time employees actually

occurred until the end of March, well after, on anyone's criteria, the employer had accepted the settlement that had already been signed and ratified by ONA.

52. The critical question is whether Roxby's decision was taken before or after the conclusion of a collective agreement for the part-time nurses' unit in London. Having carefully considered the evidence, we are satisfied that the collective-bargaining process was finalized, and a collective agreement had been concluded prior to the decision to reorganize the staffing requirements in the Retirement Lodge Division. The employer's letter of March 2nd is dated after the announcement of the layoffs but that date is not definitive because, as the union's own letters indicate, ratification may well occur prior to formal notification that it has taken place. While the union (and the Board) may legitimately question such documentation, which might be no more than an *ex post facto* rationalization, here we are satisfied that the employer had indeed accepted and bound itself to observe the terms of the part-time nurses' agreement *prior to* the decision to reconsider the role of registered nurses in the employer's organization. We find that the critical decisions were not taken during the currency of either the statutory "freeze" or the statutory bargaining duty. We find therefore that there has been no breach of either section 15 or 79 of the *Labour Relations Act*.

VII

53. The union's final argument concerns the potential application of section 10 of the *Hospital Labour Disputes Arbitration Act* which reads, in part, as follows:

10.-(1) Where, during the bargaining under this Act or during the proceedings before the board of arbitration, the parties agree on all the matters to be included in a collective agreement, they shall put them in writing and shall execute the document, and thereupon it constitutes a collective agreement under the *Labour Relations Act*.

The union argues that the retirement lodge in London is a "hospital" within the meaning of the *HLDA* and that therefore section 10 applies to the bargaining process. Section 10, the union maintains, does not contemplate an agreement "subject to ratification" and that therefore, notwithstanding the purported ratification by both parties, there has never been a collective agreement between them. Counsel submits that the formalities necessary to constitute a collective agreement have not been undertaken and that therefore there is none - despite, we might note, the understanding of both the company and union officials who gave evidence.

54. Assuming, without finding, that *HLDA* applies to the respondent's London operation, we are not inclined to read section 10 in the linear way urged upon us by the union. Not only is the union's interpretation at variance with the almost universal practice of negotiating parties (including those here) but we do not think that it is compelled by the language itself. The section involves three elements: the agreement of the parties on all matters in dispute, a written document setting out the agreed terms, and "execution", that is, the signatures of the bargainers confirming that to which they have agreed. All of those elements are satisfied here, and to the extent that they have made their agreement contingent upon ratification, that condition has also been fulfilled. We are satisfied therefore that the parties had a collective agreement upon ratification as they had anticipated and that no further steps were necessary. Accordingly, even if section 10 of *HLDA* applies, there has been no breach of the freeze or the bargaining duty.

VIII

55. For the foregoing reasons, this complaint is dismissed.

1. I dissent from the majority on one key finding. I believe the employer violated the section 15 requirement to bargain in good faith by failing to inform the union during negotiations of a decision to lay off all members of both bargaining units. The crux of the case is stated by the majority at paragraph 43 when it writes: "Roxby's decision involved a major staff reorganization in the Retirement Lodge Division, effectively eliminated the ONA bargaining units, and entirely negated two and a half years of collective bargaining." In light of the devastating impact this decision had upon the bargaining units, it is essential for the Board to examine the employer's rationale for the timing of this decision in the context of the bargaining history.

Duty to Inform

2. Part of the bargaining obligation under section 15 is the duty of the employer to provide the information necessary for the union to make informed decisions in bargaining, particularly where the information has a major impact on the bargaining unit. To cite the Board in *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577:

Similarly can there be any doubt that an employer is under a section 14 [now section 15] obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of a trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the content of bargaining.

3. The policy considerations outlined in *Westinghouse* are now well established by this Board and are relevant to this case. If the employer made the decision to lay off prior to the conclusion of collective bargaining, it had an obligation to reveal to the union this decision so that the union could make informed decisions about bargaining priorities. This is particularly crucial in a first contract situation where the union has to make bargaining decisions to help establish basic standards of protection for its membership. I accept the majority's characterization of Central Park Lodge as a market-driven operation in both its nursing home and retirement lodge divisions. Given the growing demand for health and support services for the elderly and the lack of government regulation in parts of the sector, Central Park Lodge's decision to move to the "wellness concept" was an appealing option available to the company to increase profits. However, the study and planning that went into that decision is telling in assessing when and why the decision to lay off all the nurses was made.

4. All the evidence in this case confirms that the employer thought its retirement lodge division might be less profitable in 1987; that was the rationale for its actions. Roxby, vice-president of the retirement lodge division, testified that the company only just discovered a profitability problem in February 1987 and that it took swift, drastic measures to eliminate the budget variance by laying off the nurses. His oral evidence was inconsistent with records tabled by the respondent which showed there were not substantial changes in the month-to-month records. These records also illustrated that there are rigorous reporting and accountability procedures, so the respondent was very much aware of the monthly financial situation. The retirement lodge division experienced a financially healthy period just preceding the lay-offs with profits over \$3 million in 1986 and net revenue over expenses of \$8 million plus. The budget variance cited by the respondent was a variance from the budget projections, which by the respondent's evidence are based on fairly ambitious profit targets. These are a far cry from any operating losses, and the respondent in all its evidence was very careful to characterize this as only a budget variance, not an operating loss. If the respondent had faced financial difficulties to the extent that profit was eliminated, then it might be perceived as a financial crisis, but the evidence does not show any such crisis or any need for imme-

diate and swift action. It is only Roxby's one statement in all the evidence that he needed to take swift action which appears to have tipped the scales in the majority's decision. I find the better evidence is the documented records of the respondent.

Timing of the Decision

5. The lay-off of all the members of both units, coming one week after ratification of the outstanding collective agreement, necessitates that the Board carefully scrutinize the employer's action. There is no dispute that bargaining for this first contract had been difficult and protracted with 28 bargaining sessions. Wage parity and lay-off protections were two of the most discussed items during the negotiations. The panel heard a great deal of evidence by both parties on lay-off discussions. What appears to be common ground in the evidence is the employer's testimony that he told the nurses that in light of Central Park Lodge having no history of lay-offs, the ONA was too persistent in its push for lay-off protection. The negotiator for the union, Eleanor Holroyd, testified that based upon these discussions with the employer, she finally made the decision to withdraw bargaining demands for lay-off protection. It is either a matter of great coincidence or careful timing that the employer's "swift" decision to lay off came immediately on the heels of settling the contract. In addition, it is unlikely that the employer, when making the decision, did not think of the ONA bargaining unit in London after 28 negotiating sessions, many of which had discussed lay-off protections. The majority seems persuaded that the employer did not think of the ONA and that this somehow relieves them of their bargaining obligations.

6. In *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411, the Board clarified how such cases can be approached:

On the other hand, plans and decisions to close a plant can effectively extinguish a bargaining unit and the relevance of the usual terms of a collective agreement. In this context, *where a decision to close is announced "on the heels" of the signing of a collective agreement, the timing of such a significant event may raise a rebuttable presumption that the decision making was sufficiently ripe during the bargaining to have required disclosure or that it was intentionally delayed until the completion of bargaining.*

[emphasis added]

As in *Consolidated Bathurst*, the respondent's decision, which had a devastating impact on the bargaining unit, is announced on the heels of concluding a collective agreement. This raises a rebuttable presumption that the decision was "sufficiently ripe during bargaining" to require disclosure. In this case the balance of evidence does not rebut that presumption. A number of factors in combination, including the fact that the union had identified lay-off protections as a bargaining priority, the lack of written documentation to substantiate the employer's "need for drastic action", documentation that would support the view that the respondent was fully informed of its financial position throughout the relevant time, the absence of any study or information indicating alternatives to the lay-off were considered, the lack of any financial crisis and the timing of the lay-offs, all lead me to conclude that the decision-making took place *before*, not after the completion of bargaining. Thus, I can only conclude that the employer kept the union "in the dark" and thus violated the section 15 duty to inform.

7. Finally, I would note that I do concur with the majority finding that the collective agreements were ratified and thus there was no violation of the freeze provisions. I also concur that there was no necessity for purposes of this decision to decide whether or not the retirement lodge falls under the *HLDA* and given the extensive evidence on nursing, medication and health care practices of this home, it is better left to a case where it needs to be answered.

0310-87-R United Food & Commercial Workers International Union, Local 175, Applicant v. Cuddy Chicks Limited, Respondent

Certification - Charter of Rights and Freedoms - Constitutional Law - Employees working under conditions akin to those in a factory - Employees responsible for monitoring the development of embryonic chickens - Employees found to be persons employed in agriculture - Board having jurisdiction to entertain union's challenge that exclusion of persons employed in agriculture is contrary to the Charter - Board is a "court of competent jurisdiction"

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *J. A. Ronson* and *R. R. Montague*.

APPEARANCES: *Douglas J. Wray, Wm. Richardson* and *Don Dayman* for the Applicant; *George W. Adams, Henry Dinsdale, Ted Sefton, Bill Stephens* and *Carol Ritter* for the Respondent.

DECISION OF VICE CHAIR PATRICIA HUGHES AND BOARD MEMBER R. R. MONTAGUE; May 6, 1988

1. The name of the respondent is amended to read "Cuddy Chicks Limited".
2. The United Food & Commercial Workers International Union, Local 175 ("the union") seeks certification as the exclusive bargaining agent of the employees at the hatchery of Cuddy Chicks Limited ("Cuddy Chicks" or "the employer"). The employer maintains that those employees are persons "employed in agriculture" and are therefore not covered by the *Labour Relations Act* ("the Act") by virtue of section 2(b) of the Act. The union contends, however, that section 2(b) of the Act is contrary to the *Canadian Charter of Rights and Freedoms* ("the Charter") and that if we find that these employees are employed in agriculture, we should ignore the exemption and proceed with its certification application. Counsel for the union advised the Attorney Generals of Ontario and Canada of its Charter application, as required by the Board: *F.D.V. Construction Limited*, [1986] OLRB Rep. May 617; *Dominion Paving Limited*, [1986] OLRB Rep. July 946. The Attorney General of Ontario, by letter dated July 8, 1987, asked to be acknowledged as an "interested party" to the proceedings and was given notice of this hearing, but was not represented.
3. Hearings into the union's application for certification were originally held May 22 and June 29 and 30, 1987 before a different panel of the Board ("the first panel"). After the completion of the hearing, but before that panel released its decision, one of the panel members, Mr. Jim Wilson, passed away. A new panel was therefore constituted to permit the parties to adduce evidence and make submissions on the issues arising out of the application. (The chair of the first panel is also the chair of the new panel.) In effect, these matters are to be dealt with as if they had not previously arisen before the Board except for the issues resolved by the parties in their meeting with the Labour Relations Officer prior to the start of the hearing before the first panel. (The parties are agreed that the report of the Officer applies to the proceedings before this panel.) The report of the Officer indicates that at that time, the parties agreed on the descriptions of a full-time and a part-time bargaining unit and were given the count. With respect to the part-time unit, the number of cards filed by the union was insufficient to permit a vote; with respect to the full-time unit, however, the number of cards filed by the union is sufficient to warrant certification without a vote subject to the determination of the employer's objection and, should that objection be successful, to the determination of the union's Charter challenge to section 2(b) of the Act.
4. Three dates were fixed for the hearing before the new panel. In a letter dated December 17, 1987, however, counsel for the employer wrote to the Board requesting that a day be fixed

prior to those already set in order to hear the employer's objection to the Board's taking jurisdiction to entertain the Charter issues raised by the union. As a consequence, the parties made submissions on that matter alone on a date specifically set aside for that purpose.

5. We reserved our decision on that matter until after the parties had subsequently adduced evidence and made submissions on the issue of whether the employees are "person[s] employed in agriculture". At the conclusion of argument on April 28, 1988 the agricultural issue was recessed briefly and orally gave the parties our "bottom line" decisions on both matters, and indicated reasons would follow.

6. We held unanimously that the employees are employed in agriculture and therefore the Act does not apply to them. The majority held that the Board has jurisdiction to entertain the Charter challenge brought by the applicant. We now give our reasons for both decisions.

Whether The Employees are Persons Employed in Agriculture

7. Section 2(b) of the Act states that

2. This Act does not apply,

...

(b) to a person employed in agriculture

The issue before us is whether employees who are responsible for monitoring the development of embryonic chickens and otherwise caring for the eggs during incubation and for certain aspects of the hatched chicken are employed in agriculture. (The agreed-to unit is an all employee unit. The union does not ask that we distinguish any employees from the others in the unit with respect to whether they are employed in agriculture or not.)

8. The respondent called evidence about the operation of this hatchery and expert evidence about the history and nature of the hatching process. The applicant called no evidence but argued that these employees do not engage in activities which can be defined as agricultural; furthermore, the employees work in an environment similar to that and under conditions akin to those in a factory. Counsel argues that the operation is not a family farm, nor is it seasonal; he says the employees are not engaged in feeding and growth but in a mechanized, highly automated, care-taking function.

9. There is no doubt that the hatchery is a highly mechanized, technologically sophisticated operation and that the employees in many respects work in factory-like conditions with set shifts, year-round employment and the benefits and disciplinary provisions similar to or the same as one would expect to find in a factory. We accept respondent counsel's submission that agriculture has become highly technological and commercial, but that that does not make those activities non-agricultural: *Wellington Mushroom Farm*, [1980] OLRB Rep. May 813. It is thus the nature of the activities and not the way they are performed or the tools by which they are performed that is relevant.

10. The primary purpose of the hatchery is to incubate fertile hatching eggs which come from breeding farms; the day old hatched chicks are taken to growing farms. One-third of the eggs come from farms owned by the Cuddy family, one-third from farms with which Cuddy Chicks has contracts and one-third from the United states; the day old chicks go to growing farms, in some of which the Cuddy family has an interest. We are concerned only with the hatchery employees.

11. The eggs, which are placed in a setter at the start of the incubation period, must be rotated 90 degrees every hour (to avoid the yolk touching the membrane) and kept at a specified temperature and humidity. The employees make mechanical and manual checks of those variables. They do not actually handle the eggs except to take a sample at 10 days to test for fertility. A failure to maintain the appropriate conditions will result in a decline in the hatchability of the eggs. For example, if the setter is too dry, the eggs dehydrate, killing the embryo; if the humidity is too high, there will be too much water vapour, leaving insufficient room for the development of the air cell, preventing the chick from hatching. After eighteen or nineteen days, the eggs go into the hatching room where the temperature, humidity and air flow are carefully controlled but they are no longer turned. They hatch on the twenty-first day. The embryo is a developing, growing organism. The intended result of the process are the live chicks which are graded, sexed and vaccinated by hatchery employees and then sent on to the growing farms.

12. In *Spruceleigh Farms, A Division of Canada Packers Limited*, [1972] OLRB Rep. Oct. 860, the Board held that the employees of a hatchery operated by the respondent were persons employed in agriculture. Those employees "grade[d] the eggs, tend[ed] the incubators and administer[ed] to the hatched chicks which [were] packaged in containers and [were] shipped to growing farms [owned by the respondent]". The eggs had been delivered to the hatchery from the respondent's breeding farms. The respondent also had contracts with other breeder and grower farm operators. The Board stated that "the breeding, hatching and growing operations ... are all part of the life cycle of a chicken and each forms an integral part in the operation of raising chickens". The Board was concerned, as are we, with only the employees of the hatchery. It specifically held that the growing of chickens, the activity in which the employees were engaged, is "part of the business of agriculture within the meaning of section 2(b) of the Labour Relations Act". We find nothing in the case before us that distinguishes it from the facts in *Spruceleigh Farms, supra*. We find that the incubation and hatching processes are agricultural in nature.

13. Since the activities of these employees are in themselves agricultural, we do not have to deal with the question of whether their activities, if they were not in themselves agricultural, would nevertheless be integral to an agricultural operation; therefore, *Sunnylea Foods Limited*, [1980] OLRB Rep. Apr. 530, *Ontario Tree Fruits Co-operative Limited*, (1962) 62 CLLC ¶16,235 and the cases following it referred to by counsel, are not applicable here.

14. For the reasons given in *Spruceleigh Farms, supra*, we find that these employees are employed in agriculture within the meaning of section 2(b) of the Act. Accordingly, we now give our reasons for holding that the Board has jurisdiction to entertain the Charter challenge brought by the union.

The Board's Jurisdiction to Hear the Charter Challenge

15. The tasks before us are to determine whether the Board is a "court of competent jurisdiction" within the meaning of subsection 24(1) of the Charter and, regardless of our answer to that question, whether we are permitted or required to apply the Charter to matters before us on the basis of subsection 52(1) of the Charter. Those sections read as follows:

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

• • •

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsis-

tent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

16. The Board has held since the enactment of the Charter that it has jurisdiction to entertain Charter issues arising in matters before it by virtue of section 52 of the Charter: *Third Dimension Manufacturing Limited*, [1983] OLRB Rep. Feb. 261. This approach has been consistently followed by the Board; see, for example, *Shaw-Almex Industries Limited*, [1986] OLRB Rep. Dec. 1800 (application for judicial review dismissed, unreported decision of the Divisional Court, February 11, 1988; application for leave to appeal to the Court of Appeal dismissed, February 22, 1988). Counsel for Cuddy Chicks would have us reassess that approach and find that we do not have jurisdiction, under either subsection 24(1) or section 52 of the Charter.

17. It has now been clearly established that the Charter does not enlarge or extend the jurisdiction of a court or tribunal. The Charter does not confer jurisdiction to deal with applications made under it; that jurisdiction must derive from a source external to the Charter. Thus the phrase "a court of competent jurisdiction" under subsection 24(1) obtains its meaning, not from the Charter, but from the authority of the relevant forum as it existed prior to the Charter's coming into effect and as it exists independently of the Charter. A body is "a court of competent jurisdiction" if it has jurisdiction over the persons and subject matter before it and the authority to grant the remedy requested: *R. v. Morgentaler, Smoling and Scott* (1984), 16 C.C.C. (3d) 1 (Ont. C.A.), approved in *Mills v. The Queen* (1986), 29 D.L.R. (4th) 161 (S.C.C.), at page 177. In *Morgentaler, supra*, the accused attempted to appeal a decision of the trial judge who had refused their motion to quash or stay the indictment which had been preferred against them that they allegedly conspired to procure abortions contrary to sections 251(1) and 423(1)(d) of the *Criminal Code*. The Court of Appeal held that it has no authority to hear appeals in interlocutory matters and that section 24(1) of the Charter "does not purport to create a right of appeal or bestow appellate powers on this or any other court. Rather it authorizes those courts which have statutory appellate jurisdiction independent of the Charter to exercise the remedial power in s.24(1) in appropriate cases when disposing of appeals properly brought before the court". Nor did the Court find jurisdiction in section 52 of the Charter. The trial court was the appropriate court in which the accused, in these circumstances, could apply under subsection 24(1) for a remedy for the purported Charter violations. It should be noted that it was not alleged that any specific Charter right was infringed by the Court of Appeal's lack of authority to hear appeals of interlocutory rulings; nor did the Court of Appeal hold that because it did not have jurisdiction prior to the Charter to hear such appeals, it did not have jurisdiction over the persons (that is, the accused) or the subject matter before it to determine the matter raised by them.

18. The most elaborate consideration of the phrase "court of competent jurisdiction", albeit limited to the criminal context, occurs in *Mills, supra*. In that case, the Supreme Court of Canada found that a provincial court judge presiding at a preliminary inquiry is not a court of competent jurisdiction because he or she cannot grant a remedy for a violation of the Charter's guarantee in section 11(b) of a right to a trial within a reasonable time. The accused had sought a stay of the proceedings on the basis that his section 11(b) right had been infringed. Although the preliminary hearing judge dismissed the motion, he held that he was a court of competent jurisdiction within the meaning of subsection 24(1) of the Charter. All the members of the Supreme Court held that a provincial court judge presiding at a preliminary inquiry is not a court of competent jurisdiction, although three justices held that such a judge has authority to exclude evidence under subsection 24(2) of the Charter. Speaking for the majority, McIntyre J. pointed out at pages 172-173 that the procedural and substantive powers of a preliminary hearing magistrate are specifically set out in sections 465, 468 and 475 of the *Criminal Code* (granting a stay is not among those powers) and that

[h]e has no jurisdiction to acquit or convict, nor to impose a penalty, nor to give a remedy. He is given no jurisdiction which would permit him to hear and determine the question of whether or not a Charter right has been infringed or denied. He is therefore not a court of competent jurisdiction under s.24(1).

19. The Court acknowledged that most applications for a Charter remedy in criminal matters will be made to courts exercising criminal jurisdiction other than the provincial superior court. As stated by McIntyre J., in *Mills, supra*, page 73, these courts will be courts of competent jurisdiction, “where they have jurisdiction conferred by statute over the offences and persons and power to make the orders sought” and “[a] claim for a remedy under s.24(1) arising in the course of the trial will fall within the jurisdiction of these courts as a necessary incident of the trial process”. The inferior courts never have jurisdiction where the claim is for a prerogative remedy or “where a claim for relief, if granted, would involve interference in proceedings before another court”. In such cases, only the superior court will have jurisdiction, as it will when it is the court of first instance, that is, “in cases where the issue arises in matters proceeding before it or where the proceeding originated in that court because of the absence of another forum with jurisdiction” (*Mills, supra*, page 174). However,

[t]he superior court function will not displace that of other courts of limited jurisdiction. Considerations of convenience, economy and time will dictate that remedies under s.24(1) will ordinarily be sought in the courts where the issues arise.

Again, the dissenting judges shared the view that superior courts, while always having jurisdiction, should decline to exercise it where the trial court is competent to award just and appropriate relief.

20. The analysis in *Mills, supra*, was affirmed and clarified in *Rahey v. The Queen* (1987), 33 C.C.C. (3d) 289 (S.C.C.). Rahey maintained that his right under section 11(b) of the Charter had been violated with respect to his trial for alleged contravention of the *Income Tax Act*. A considerable portion of the delay was the result of repeated adjournments initiated by the trial judge for his decision on the defence’s motion for a directed verdict. A judge of the Nova Scotia Supreme Court ruled that while the trial court, in that case the provincial court, would normally have jurisdiction to deal with the Charter application, in that case, because the delay resulted from the trial judge’s own actions, the superior court should exercise its jurisdiction. In agreeing with that decision, the Supreme Court of Canada confirmed that the superior court will exercise jurisdiction only in exceptional circumstances. Lamer, J., speaking for himself and five other judges, said at pages 298-299:

As was decided in *Mills v. The Queen, supra*, a court of competent jurisdiction for the purposes of s.24(1) in an extant case is, as a general rule, the trial court. It is the judge sitting at trial who would have jurisdiction over the person and the subject-matter and would have jurisdiction to grant the necessary remedy. In *Mills*, it was also decided that the superior courts should have “constant, complete and concurrent jurisdiction” for s.24(1) applications. But it was therein emphasised that the superior courts should decline to exercise this discretionary jurisdiction unless, in the opinion of the superior court and given the nature of the violation or any other circumstance, it is more suited than the trial court to assess and grant the remedy that is just and appropriate. The clearest, though not necessarily the only, instances where there is a need for the exercise of such jurisdiction are those where there is as yet no trial court within reach and the timeliness of the remedy or the need to prevent a continuing violation of rights is shown, and those where it is the process below itself which is alleged to be in violation of the Charter’s guarantees. The burden should be on the claimant, in this case Mr. Rahey, to establish that the application is an appropriate one for the superior court’s consideration.

Thus, the presumption is in favour of the body in which the matter involving the Charter application first arises; this is indicated by McIntyre J.’s comments in *Mills, supra*, that “[c]onsiderations of convenience, economy and time will dictate that remedies under s.24(1) will ordinarily be

sought in the courts where the issues arise" and by Lamer J.'s statement in *Rahey, supra*, that "[t]he burden should be on the claimant ... to establish that the application is an appropriate one for the superior court's consideration". Where the forum of first instance has jurisdiction over the person and subject matter and authority to grant the remedy requested, it is a "court of competent jurisdiction" within the meaning of subsection 24(1) of the Charter and, in the normal course, will be the appropriate forum to determine Charter issues arising out of matters otherwise properly before it.

21. Does the Ontario Labour Relations Board have status as "a court of competent jurisdiction"? And if the answer to that question is in the affirmative, is there anything in this particular case which would make the superior court a more appropriate forum than the Board in which the applicant should raise the Charter challenge to section 2(b) of the Ontario *Labour Relations Act*? In *Mills, supra*, the Supreme Court limited its analysis to traditional criminal courts. The only reference to tribunals can be found at pages 190-191 of the dissent of Lamer J. in which he parenthetically observed that "[w]e need not decide here whether tribunals are included in the word 'court'". Thus while *Mills, supra*, is determinative of the meaning of the phrase "competent jurisdiction", it leaves the meaning of the term "court" in that context yet to be decided. We find assistance on the latter point in the decisions of lower courts which have considered the question, however, although in some instances the forum at issue was a board of arbitration appointed under a collective agreement, rather than a tribunal appointed to interpret and administer a statutory scheme.

22. We were referred to several cases in which tribunals similar to the Board have been found to be "courts of competent jurisdiction". The British Columbia Court of Appeal, in *Moore v. The Queen in Right of British Columbia* (unreported, February 3, 1988), aff'g (1986), 4 B.C.L.R. (2d) 247 (B.C.S.C.) [leave to appeal to the S.C.C. dismissed May 26, 1988], found that a board of arbitration which obtained its powers from the *Labour Code of British Columbia*, is a court of competent jurisdiction. Moore had complained that she had been dismissed from her position as a social worker with the Ministry of Human Resources in contravention of her freedom of conscience and religion when, on religious grounds, she refused to sign an authorization to pay a claim for abortion expenses. The court found that the arbitration board had jurisdiction over the parties, the subject matter (dismissal) and could "provide all the remedies appropriate for a court of competent jurisdiction to grant under section 24(1)". The court, on the other hand, did not have jurisdiction to deal with Moore's grievance and grant her a remedy for dismissal where there was a collective agreement in effect. Subsequently, the British Columbia Labour Relations Board found itself to be a court of competent jurisdiction to entertain an argument that the picketing provisions of the British Columbia *Labour Code* contravened the Charter's guarantee of freedom of expression: *Overwaitea Foods Division of Jim Pattison Industries Ltd.* (1987), 14 C.L.R.B.R. (N.S.) 268.

23. The Federal Court of Appeal has held that an umpire on appeal from a decision of a Board of Referees under the *Unemployment Insurance Act, 1971* is a court of competent jurisdiction: *Clarence Zwarich v. Attorney General of Canada* (1987), 26 Admin L.R. 295, which dealt with whether a provision under the *Unemployment Insurance Act* exempting from receipt of benefits a person who lost employment because of a stoppage of work resulting from a labour dispute contravenes sections 7 and 17 of the Charter, and *Joseph Edward Robinson v. Attorney General of Canada* (unreported; June 17, 1987), in which the issue was whether a distinction made under the *Unemployment Insurance Act* between payments received under group insurance plans (deemed to be earnings) and payments received under private plans (not deemed to be earnings) is discriminatory under section 15 of the Charter. In both cases, the Court held that while the umpire should have considered the Charter arguments, he should have rejected them as having no merit. Section 96 of the *Unemployment Insurance Act*, which sets out the powers of the umpire, begins "[a]n umpire may decide any question of law or fact that is necessary for the disposition of any

appeal taken pursuant to section 95" and goes on to permit the umpire to dismiss the appeal, confirm, rescind or vary the decision, give the decision that should have been given by the board of referees, or refer the matter back to the board of referees with directions if appropriate. In *Zwarich, supra*, Pratte J., for the Court, acknowledged that "neither a board of referees nor an umpire ha[s] the right to pronounce declarations as to the constitutional validity of statutes and regulations", but they do have the responsibility of determining that the provisions they are required to apply have been constitutionally enacted; specifically, the umpire can decide whether the Board of Referees' decision accords with the law only after he has determined that the provision it applied was constitutionally enacted. The same analysis underlies the decision in *Robinson, supra*.

24. In *Edward Fat Law v. Solicitor General of Canada and Minister of Employment and Immigration*, [1983] 2 F.C. 181, Mahoney J. held that the Immigration Appeal Board ("the Appeal Board") is "a court of competent jurisdiction" on the basis of its powers under subsection 59(1) of the *Immigration Act* which, in relation to the particular matter at issue before the Appeal Board (a removal order) grants the Appeal Board "sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction, that may arise in relation to the making of a removal order".

25. Counsel for Cuddy Chicks referred us to several cases which he submits stand for the proposition that we do not have jurisdiction to hear the union's Charter argument. In none of these cases was the court required to determine whether a tribunal possessing powers similar to those exercised by the Board is a court of competent jurisdiction.

26. In *United Nurses of Alberta, Local 115 v. Foothills Provincial General Hospital Board* (1987), 40 D.L.R. (4th) 163, Chrumka J., of the Alberta Court of Queen's Bench, found that a board of arbitration was not a court of competent jurisdiction. The collective agreement required the employer to put up a bulletin board for the union to post its activities, but reserved to the employer "the right to require that posted materials damaging to the Employer be removed". The hospital had taken down material posted by the union; in an interim decision, the board of arbitration found that this did not breach the collective agreement (Chrumka J. approved this finding.) Subsequently, the board of arbitration considered the union's Charter argument that this provision contravened the Charter's freedom of expression, finding that it was a court of competent jurisdiction (a position with which both counsel apparently agreed), because the remedy it would grant, should the applicant be successful, was a declaration that the employer's actions in removing the material were a violation of the collective agreement. Presumably, in order to find that the hospital had violated the collective agreement, the board of arbitration, in light of its interim ruling, would have had to find that the second part of the relevant article, reserving rights of removal to the employer, contravened the Charter and would therefore have had to treat the provision as if it did not contain that qualification. Chrumka J. was of the view that the board of arbitration did not have the authority to grant the required remedy, which he characterized as a declaration that the impugned provision in the collective agreement was invalid, since the scope of its jurisdiction to deal with Charter matters depends on the scope of its jurisdiction in the collective agreement which specifically prohibits the arbitration decision from altering, amending or changing the terms of the collective agreement. It should be noted that although he did not consider this particular board of arbitration to be a court of competent jurisdiction because the remedy requested was outside its jurisdiction, Chrumka J. expressed the view more generally that 'a court of competent jurisdiction' ... is not restricted in its meaning just to courts of record but includes any tribunals which are created or exist under authority of law for the purpose of administrating justice". It is also useful to note that in contrast to the limited powers of the arbitration board in *Foothills Provincial General Hospital Board, supra*, under the British Columbia *Labour Code*, which applied in *Moore, supra*, a

board of arbitration has the explicit power to interpret statutes "intended to regulate the employment relationship of the persons bound by a collective agreement notwithstanding that [their] provisions conflict with the terms of the collective agreement".

27. *Attorney General of Canada v. David J. Vincer* (unreported decision of the Federal Court of Appeal, December 1, 1987) involves the jurisdiction of a review committee under the *Family Allowances Act*, a forum of appeal for a person whose claim for an allowance has been denied by officials of the Department of National Health and Welfare. The remedy sought was to pay half the family allowance to a father who shared joint custody of their children when he and his wife separated; the legislation provides that the allowance be paid to the mother except in exceptional circumstances, of which Vincer's situation was not one. Stone J. rested his decision that the review committee is not a court of competent jurisdiction on the powers of the committee as set out in its governing legislation (it is limited to reviewing on appeal the refusal to pay an allowance and in doing so may confirm or vary the decision or rescind or amend it): "it signally lacks any power to grant a remedy under subsection 24(1) of the Charter". It appears not to have been given the power to determine questions of law, for his Lordship distinguished *Zwarich, supra*, on the basis that umpires under the *Unemployment Insurance Act* are sitting or former judges who have been given the express power to determine questions of law. Marceau J. took a similar view. His Lordship referred to subsection 65(1) of the *Immigration Act* which states that "[t]he [Immigration Appeal] Board is a court of record" in order to distinguish *Law, supra*, from the facts before him in *Vincer*; it must be observed, however, that Mahoney J. did not refer to subsection 65(1) in his decision in *Law, supra*, except to cite it along with other sections, and rested his conclusion solely on subsection 59(1). Marceau J's concern appears to have been the nature of the review committee, which has been granted limited powers and the members of which have no special qualifications. His Lordship described the review committee as "a simple *ad hoc* committee whose role is to oversee, in a particular case, the administrative process involved in the scheme adopted by Parliament for the awarding of family allowances".

28. The weight of authority appears to lean in favour of a tribunal such as the Board being considered "a court of competent jurisdiction" within the meaning of subsection 24(1) of the Charter. Nevertheless, although we may find judgments of other provincial and federal courts and tribunals of assistance, we are, of course, not bound by them and would be required to reject them should the courts of this province take a different view. We are, needless to say, bound by the Ontario Divisional Court. Accordingly, we consider in some detail employer counsel's contention that the Divisional Court has taken the position that tribunals are not courts of competent jurisdiction.

29. Counsel referred us to *Ontario Public Service Employees' Union v. Algonquin College of Applied Arts and Technology* (unreported decision of the Divisional Court, April 16, 1987) and to *The Greater Niagara Transit Commission v. The Amalgamated Transit Union and Its Local 1582 (Niagara Falls)* (1987), 61 O.R. (2d) 565 (Div. Ct.), as authority for the proposition that the law in Ontario is that quasi-judicial administrative tribunals such as the Board are not courts of competent jurisdiction under subsection 24(1) of the Charter. Neither of those cases actually deals with a tribunal such as the Ontario Labour Relations Board. Furthermore, the applicability of the Divisional Court's view in *Algonquin College, supra*, has been cast in doubt by the Court of Appeal (unreported dismissal of application for leave to appeal, June 29, 1987).

30. In *Algonquin College, supra*, the Divisional Court found in *obiter* that a board of arbitration is not a court of competent jurisdiction; its decision, however, does not seem to be limited to arbitration boards appointed under a collective agreement:

...In our view, it is clear that only a Court, in the traditional sense, can qualify as a court of

competent jurisdiction' provided it is empowered with the requisite jurisdiction and authority referred to in *Mills*[,supra]. See the comments of McIntyre J. at pages 171-174 and 177.

...[T]he general power of arbitrators to interpret legislation necessarily incidental to the performance of the task assigned does not extend to the interpretation of constitutional enactments. Where such an issue arises, or is seen as arising, in a matter before a lay tribunal, the appropriate course to be followed is that an application be made to a court of competent jurisdiction for a decision on the constitutional question so that the arbitrator may perform its assigned task armed with the court's opinion and advice.

With respect, it is not clear whether the Court is confining its remarks to board of arbitration appointed under a collective agreement or whether it is including all administrative and quasi-judicial tribunals within its comments. Since the courts, including the Ontario Divisional Court and judges of the Supreme Court Trial Division, have encouraged labour boards to consider and determine division of powers issues which arise in matters otherwise properly before them, it is unlikely that the Divisional Court meant that labour boards do not have the power to interpret "constitutional enactments": *Re Windsor Airline Limousine Services and Ontario Taxi Association 1688 et al* (1980), 30 O.R. (2d) 732 (Div. Ct.). Furthermore, the Supreme Court of Canada has indicated the considerable value of labour relations tribunals' dealing thoroughly with such issues: *Northern Telecom Ltd. v. Communications Workers of Canada et al* (1979), 98 D.L.R. (3d) 1 (S.C.C.), at p. 19. It may be, therefore, that the Court did not intend to include such tribunals in its remarks. That it may be interpreted as having done so, however, is supported by the broad wording of the Court of Appeal's endorsement dismissing the union's application for leave to appeal the Divisional Court's decision, *supra*, which contains this paragraph following the dismissal:

In dismissing the application for leave to appeal we are not to be taken as agreeing with the Divisional Court that only a court in the traditional sense of that word can interpret the Charter, or any other constitutional enactment.

31. Counsel for Cuddy Chicks submits that the effect of the Court of Appeal's endorsement is to make the law in Ontario that as stated in the Divisional Court's decision. We are of the view that if the Court of Appeal had been satisfied that that reflected the appropriate statement of the law, it would not have taken the unusual step of adding a paragraph to its usual one line endorsement dismissing the application for leave to appeal. The endorsement does not, of course, tell us what the law on this matter is, but it is sufficient to indicate that the issue remains open. Accordingly, even if the Divisional Court had intended to include tribunals such as the Ontario Labour Relations Board in its *obiter*, and that is, in our respectful opinion, far from clear, we are satisfied that we are not obliged by the Divisional Court's decision in *Algonquin College*, *supra*, to conclude that we do not have jurisdiction under subsection 24(1) of the Charter.

32. At the outset of his argument on the agricultural issue, counsel for Cuddy Chicks gave us a decision of the Divisional Court which had been released after the conclusion of argument on the issue of whether we have jurisdiction to hear the Charter challenge: *The Board of Governors of St. Lawrence College of Applied Arts and Technology v. Ontario Public Service Employees Union* (unreported decision of the Divisional Court, April 13, 1988). The Divisional Court in that case followed its decision in *Algonquin College*, *supra*, and did not refer to the Court of Appeal's endorsement in that case, although, as counsel submitted, it must be taken to have been aware of it. With respect, given the brevity of the endorsement, we do not find any greater assistance on this issue in this case than from the *Algonquin College* case, *supra*, which we have considered above.

33. A board of arbitration appointed under a collective agreement was also at issue in the *Niagara Transit Commission* case, *supra*, released after the Court of Appeal's endorsement in *Algonquin College*, *supra*, to which the Court in *Niagara Transit Commission* makes no reference.

An employee of the Commission had been charged with theft of money from fare boxes; the Commission deferred to the criminal proceedings instead of taking immediate action against the employee. At the trial, the judge had refused to admit into evidence under subsection 24(2) of the Charter a statement made by the employee because it followed, in the judge's finding, a contravention of the employee's right to retain and instruct counsel under section 10(b) of the Charter. After the employee's acquittal, the Commission discharged him and the union grieved the discharge. At the arbitration, the Commission sought to introduce the statement which the trial judge had excluded. The board of arbitration refused to admit the statement because its exclusion by the trial judge constituted a "ruling of a court of competent jurisdiction as to the infringement of section 10(b) of the Charter" and "[t]here is no reason, and probably no power in this Board of Arbitration, to come to an opposite conclusion". The board of arbitration also said that "[e]ven if the employer relied upon [the evidence] when the matter comes before a Board of Arbitration [and it cannot because it has been excluded by a court of competent jurisdiction] the Board is bound to apply the provisions of section 24 dealing with the enforcement of guaranteed rights and freedoms and cannot rely upon such evidence". Watt J. for the Divisional Court held that the board of arbitration had erred in failing to admit the evidence; in particular, his Lordship pointed out that a determination that evidence is to be excluded applies only to the proceeding in which it is tendered; thus the standard of proof applicable to the proceeding is a relevant factor and, of course, the standards of proof are different in criminal and grievance proceedings.

34. On the specific issue before us, Mr. Justice Watt said the following:

It has further not been here submitted that the Arbitration Board, *suo motu*, could exclude the proposed evidence under s-s.24(2) of the *Charter*. The Board did not purport to do so. In order to do so it would, of course, first be necessary for the Board to be "a court of competent jurisdiction" within s-s.24(1) so that it could make the express finding of constitutional infringement or denial which is a condition precedent to the grant of the evidentiary relief under s-s.24(2). On a plain reading of the whole section 24, most especially in light of the legal right said to have been here infringed, s-s. 10(b), such a conclusion, in my respectful view, is, quite simply, untenable. See generally, *Re Trumbley et al and Fleming et al and three other appeals*, (1986), 55 O.R. (2d) 570 (C.A.).

In *Re Trumbley*, *supra*, the Court of Appeal was concerned with whether a police disciplinary tribunal is an independent and impartial tribunal within the meaning of section 11(d) of the Charter. The Court of Appeal, considering that section 11 refers to an "offence" and that police officers subject to disciplinary proceedings have not been charged with an "offence" within the meaning of that section, held that section 11 could not have any application to the police disciplinary tribunal. Furthermore, said the Court, "a police discipline matter is a purely administrative process" with respect to employment matters which would otherwise be dealt with through the collective agreement. (*Re Trumbley*, *supra*, has been upheld by the Supreme Court of Canada in a decision released November 19, 1987.) Watt J.'s reliance on *Re Trumbley*, *supra*, suggests that the following analysis applies in the circumstances of the *Niagara Transit* case, *supra*: section 10 of the Charter applies to persons "on arrest or detention"; the employee of the Transit Commission was not under "arrest or detention" with respect to the grievance proceeding; nor does the board of arbitration have the jurisdiction to grant a remedy resulting from a contravention of section 10 because it applies to criminal matters in which the board of arbitration has no jurisdiction. Accordingly, it is not a court of competent jurisdiction under subsection 24(1) of the Charter with the power to exclude evidence as a result of a contravention of section 10 of the Charter. In brief, the board of arbitration, because of the particular nature of the provision involved and its limited jurisdiction, did not have authority to grant the remedy in question.

35. Counsel for Cuddy Chicks advanced policy reasons supporting the inappropriateness of the Board's entertaining Charter applications in the course of applications and complaints filed

with it. Counsel made it clear that these considerations are not intended to convince us not to exercise a jurisdiction we legally have, but rather are considerations intended to bolster his position that we do not have that jurisdiction.

36. Counsel maintained that the Board's expertise is not in constitutional law, but in labour law. It is, of course, correct to say that the Board's expertise is in labour law; that is why it is particularly appropriate for the Board to deal with Charter matters arising during the course of labour related applications and complaints, as it does with division of powers issues. It is peculiarly within the Board's area of expertise to apply labour relations considerations that arise both in the challenge to a provision of the Act and in any section 1 defence that might be advanced. The Board's findings of fact on those issues and its analysis of relevant labour relations policy should be of assistance to a court which is asked to consider the question on judicial review.

37. Counsel further maintained that Charter cases are different than division of powers cases in the sense that the Charter regulates government and it should therefore be applied by a separate judiciary and not by the Board, a part of the executive branch of government. The view that Charter issues should be dealt with by a separate judiciary (we assume by this counsel means the "traditional courts") was raised by Marceau J. in *Vincer, supra*. Even so, his Lordship appeared to believe that certain tribunals could have the authority to determine whether provisions of legislation conformed to the Charter. That view has not been clearly raised or developed in any other case of which we were made aware (except as has been indicated in the context of *Algonquin College, supra* and *St. Lawrence College, supra*) and we are not satisfied that the criteria for "a court of competent jurisdiction" set out in *Mills, supra*, necessarily require a distinction to be made between "traditional" courts and tribunals which are authorized to determine questions of law, are required to act judicially in so doing and which adjudicate a *lis* between the parties; furthermore, as already stated, the Court of Appeal's endorsement in *Algonquin College, supra*, makes it clear that the question remains open in Ontario. The Federal Court of Appeal and the British Columbia Court of Appeal have both held non-traditional courts to be "courts of competent jurisdiction under subsection 24(1) of the Charter: see *Zwarich, supra*, and *Robinson, supra*, and *Moore, supra*, respectively. In a recent decision, the Divisional Court has indicated the difficulties in distinguishing "courts" from other decision-making bodies: in *Re West End Construction Ltd. et al and Ministry of Labour for Ontario et al* (1986), 57 O.R. (2d) 391, Anderson J. refers to "that twilight zone which divides the administrative from the judicial" (the Court held that a complaint under the *Ontario Human Rights Code* is a civil proceeding and therefore an action for the purposes of the *Limitations Act*). As was so in the case before the Human Rights Commission, a *lis* between the parties is involved in this application for certification and in other proceedings before the Board. Furthermore, the Board is authorized to determine questions of law and, as indicated, is required to act judicially in so doing.

38. In counsel's view, because of our status as a tribunal, we should abide by a presumption of constitutional validity of the provisions of the Ontario *Labour Relations Act*. The principle that a statute is presumed to be constitutionally valid applies in division of powers cases. With respect to the Board's assuming the constitutionality of an impugned provision in Charter cases, we refer to *Manitoba (Attorney General) v. Metropolitan Stores Ltd.* [1987] 1 S.C.R. 110, in which Mr. Justice Beetz, for the Court, stated at page 122 that "the innovative and evolutive character of the *Canadian Charter of Rights and Freedoms* conflicts with the idea that a legislative provision can be presumed to be consistent with the Charter". (In that case, the Supreme Court set aside a stay of proceedings by the Manitoba Court of Appeal against the Manitoba Labour Board. The stay had been sought by an employer which had commenced proceedings in the Court of Queen's Bench to have the first contract provisions of the Manitoba *Labour Relations Act* declared invalid as contravening the Charter and wished to prevent the Manitoba Labour Board from proceeding in the first

contract case in which the employer was a respondent.) That the presumption of constitutional validity principle (in this limited sense) does not apply in Charter cases in the same way as it applies in division of powers cases is implicit in section 52's declaration that the Constitution is the supreme law and in the imposition of the burden of proof on a party seeking to defend the impugned provision under section 1 of the Charter.

39. Finally, submitted counsel, Charter cases may involve considerable evidence and length of hearings for which the Board is not equipped and which may have to be repeated in court should the Attorney General, not having been represented in the hearing before the Board, seek to introduce evidence before the court on judicial review. We do not doubt that Charter cases may involve lengthy hearings; however, if the Board legally has jurisdiction to deal with Charter issues, it is not for the Board to abdicate that jurisdiction at the behest of one party simply because it may be faced with the prospect of long and complex hearings. In *Mills, supra*, La Forest J. commented at page 245 that "extending the ambit of the specific task assigned to the magistrate by the Code" would "unnecessarily complicate his task, require more evidence or at least a more thorough sifting of evidence than is required at a preliminary hearing, and in any event require the magistrate to look at the issues before him in a manner different from that contemplated by the Code". In the case of Charter issues brought before the Board in matters otherwise properly before the Board, in contrast, consideration of the Charter issues is simply another aspect integral to the Board's determination of the case before it, rather than an extension of the task assigned to the Board by the Act.

40. These policy considerations were advanced, according to the employer's counsel, in order to help us "resolve the ambiguity in the case law: in our view, there is no such ambiguity. As the above analysis of the jurisprudence indicates, it is a question in relation to each court or tribunal or decision-making body whether it has jurisdiction over the persons, subject matter and authority to grant the remedy sought in the specific circumstances at issue. The cases which find that a particular adjudicative body has jurisdiction under subsection 24(1) of the Charter and those which do not so find can be distinguished on the basis of the powers of the particular forum in issue and of the nature of the remedy requested. For example, the powers of the review board in *Vincer, supra*, and of the arbitration board in *Foothills Provincial General Hospital Board, supra* are more limited than those of the umpire in *Zwarich, supra*, and *Robinson, supra* or of the arbitration board in *Moore, supra*. Similarly, the arbitration board in *Niagara Transit Commission, supra*, could not grant the remedy at issue while the arbitration board in *Moore, supra*, could - and, it should be emphasized with respect to *Moore, supra*, that the court could not grant the remedy or, indeed, entertain the grievance as could the board of arbitration.

41. The starting point for determining whether the Board is "a court of competent jurisdiction" is its authority as granted by the *Labour Relations Act*. The Board's jurisdiction, prior to and independently of the Charter, is found in sections 106(1) and 108 of the Act:

106.(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

108. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgement, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

Together these sections give the Board exclusive jurisdiction to deal with all matters arising under the Act, including the power to deal with matters of law arising in matters properly before the Board.

42. In determining Charter matters, the Board is involved not only in interpreting the Charter, a constitutional document, but also in making determinations of fact and in interpreting its home statute. The Board's decisions on non-jurisdictional matters are protected on judicial review by section 108 of the Act, the "privative clause"; that is not the case with matters the courts have determined or do determine go to the Board's jurisdiction: *CUPE v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227. The Board cannot give itself jurisdiction through a wrong decision or through the application of its own rules: *R. v. Ontario Labour Relations Board, Ex parte Dunn* (1963), 39 D.L.R. (2d) 346. It nevertheless remains that the Board has sole jurisdiction to deal with the matters set out in the Ontario *Labour Relations Act* and that the courts do not have jurisdiction to do so (cf. *Moore, supra*). Prior to the Charter, the Board, and not the courts, was competent to hear and determine, for example, allegations of unfair labour practices, sale of business applications, unlawful strikes and lock-outs and applications of the sort before us in this case: applications for certification. That competence remains: the Board has jurisdiction over those subject matters and over the persons before the Board on such applications and complaints, and can grant remedies in relation thereto where it finds a violation of the Act or in the case of certification applications, when the applicant establishes the elements which entitle it to be certified. Thus where Charter issues arise and the remedy requested is one which the Board can already grant, "considerations of convenience, economy and time" indicate that the Board has jurisdiction to and should entertain those Charter issues (see *Mills, supra*, and *Rahey, supra*). Employer's counsel contends that the Board is not given the power in the Act to declare the Act or any provision of it invalid; that, of course, is the case; in addition, the power to make a *declaration* of invalidity rests with the superior courts. However, a finding that a provision is inconsistent with the Charter on the basis that the provision is of no force or effect does not constitute a declaration, but is "a decision of a legal question properly before the court": *Re Shewchuk and Ricard* (1986), 28 D.L.R. (4th) 429 (B.C.C.A.), per Macfarlane J.A., for the majority; also see *Zwarich, supra*, and *Moore, supra*. We conclude, therefore, that the Ontario Labour Relations Board may be a court of competent jurisdiction within the meaning of subsection 24(1) of the Charter.

43. In this case, however, it is argued that we do not have jurisdiction because we do not have jurisdiction over the persons or subject matter of the application if we were to find that the employees who are the subject of the certification application are employed in agriculture. It is obvious that the Board cannot, absent the Charter, certify the union as the exclusive bargaining agent of employees who are employed in agriculture, since the Act does not apply to such employees. It does, however, have jurisdiction to entertain the application for certification and to consider and determine whether the affected employees are employed in agriculture. Prior to the Charter, once the Board found that the employees were employed in agriculture, it dismissed the application for certification: see, for example, *Wellington Mushroom Farm, supra*. The question before us is whether, when the applicant has challenged the exemption under the Charter, the Board is required to dismiss the application and the applicant compelled, if it wishes to pursue the matter, to make an application to the Supreme Court of Ontario for a declaration that the exemption contravenes the Charter and, if it is successful, to then return to the Board with the declaration of invalidity in hand requesting the Board to hear the application for certification? Clearly the superior court can make the declaration, should it consider it appropriate to do so, but it cannot consider the applicant's application for certification; in short, it cannot grant the remedy actually sought by the union. This was the case in *Moore, supra*; there the British Columbia Court of Appeal pointed out that "[a] declaration by the court on the question could produce no better

result than a finding by the arbitrator, and would be an unwarranted interference by the court in a labour relations matter" since "just and appropriate relief can be granted by another tribunal".

44. It is, of course, the union which makes the Charter application, not the employees themselves. The union is acting, in the broad sense of the term, as the "agent" of the employees who have shown an interest in being represented by it. Under the scheme of the Act, employees may select their bargaining agent by signing applications for membership in the union before the hearing into the certification application, they may, in certain circumstances, express their choice in a vote directed by the Board after the application has been heard, they may object at the hearing to being represented by the union making the application, they may subsequently seek to terminate the union's status as their bargaining agent, they may participate when another union seeks a declaration that it has become the successor the union representing them: but they cannot themselves make an application for certification. Only a union has status to seek certification as the exclusive bargaining agent of the employees; those employees do not have status to make an application to certify the union as their bargaining agent. In this case, the union can evidence the support in the form of applications for membership and payment by each such employee of \$1.00 of over 55% of the full-time employees whom it has sought to organize. It has chosen to represent the employees by seeking certification before the Board, including raising its Charter argument in response to the employer's objection to its certification. In our view, section 52 of the Charter requires the Board to satisfy itself that section 2(b) of the Act is not inconsistent with the Charter before it applies it. The Board has the authority "to determine all questions of fact or law that arise in any matter before it"; this application is at this point properly before us and as part of the application there has arisen the factual and legal question of whether the exemption which may serve to bar the union's certification, regardless of whether it enjoys sufficient support for certification, is constitutional.

45. Section 52 of the Charter imposes on the Board an obligation to apply the Ontario *Labour Relations Act* in a manner consistent with the requirements of the Charter, as was made clear by the Chief Justice in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at page 353:

If a court or tribunal finds any statute to be inconsistent with the Constitution, the overriding effect of the *Constitution Act, 1982*, s.52(1), is to give the Court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer "of force or effect".

[emphasis added]

The underlying legal and policy justifications for its assumption of jurisdiction under section 52 from the Board's perspective were set out in *Third Dimension, supra*. We agree that the Board is required to interpret the *Labour Relations Act* in a manner that is consistent with the requirements of the Constitution. In the course of considering applications and complaints before it, the Board must take into account the effect of the Charter, where it is raised by one of the parties before it: *Moore, supra*, *Zwarich, supra*. If we were to refuse to entertain the applicant's Charter application on the ground that, having found these employees to be employed in agriculture, we no longer have jurisdiction over the persons or subject matter before us, we would be remiss in our obligation to ensure that the law we are applying is consistent with the supreme law of Canada.

46. Having considered the case law and the policy reasons advanced by counsel, we continue the approach set out in *Third Dimension, supra*, and the cases following it, of entertaining Charter issues arising in applications and complaints brought under the Act. Given the jurisdiction "to determine all questions of ... law that arise in any matter before it", the Board is required to consider those questions in light of the Charter's constitutional supremacy over all other laws,

including the Ontario *Labour Relations Act*. With respect to subsection 24(1), we are satisfied for the reasons given above that the Board constitutes “a court of competent jurisdiction” with respect to matters properly before it. We do not consider this an appropriate case in which the “presumption” (as that term takes its meaning from *Mills, supra*, and *Rahey, supra*) in favour of the forum in which the matter would normally proceed should be displaced: the union’s application for certification is properly before us, as are the union and the employer; we have the authority to grant certification, the remedy sought by the union. The employer objects to the application on the basis of section 2(b) of the Act; the validity of section 2(b) has been brought into issue by the union and in our view, we could not lawfully dismiss this application on that basis until we had determined that the agricultural exemption is consistent with the Constitution.

47. This matter is directed to the Registrar to set dates for this panel to hear evidence and argument on the union’s Charter challenge to section 2(b) of the Act.

DECISION OF BOARD MEMBER JAMES A. RONSON; May 6, 1988

1. As stated in the decision of Vice-Chair Hughes and Board Member Montague, we are unanimously of the view that the employees for whom the Applicant Union seeks bargaining rights are “persons employed in agriculture” within the meaning of section 2(b) of the *Labour Relations Act* (“the Act”). Normally that finding would terminate these proceedings, but the Applicant Union has asked the Board to declare that section 2(b) of the Act contravenes the *Canadian Charter of Rights and Freedoms* (“the Charter”). It will argue that the Board should strike section 2(b) from the Act. Section 2(b) reads as follows:

2. This Act does not apply,

• • •

(b) to a person employed in agriculture, hunting or trapping

2. By its own motion the Respondent Employer submits that the Board has no jurisdiction or authority to declare that section 2(b) of the Act “has no force or effect” (section 52(1) of the Charter). More specifically the Employer submits that the Board is not a “court of competent jurisdiction” (section 24(1) of the Charter), from whom the Union may obtain an order striking section 2(b) from the Act. It is this narrow question of jurisdiction that concerns the Board in this decision.

3. It is trite to say that the Board is a creature of statute deriving its authority only from the express provisions of the Act. If the provisions of the Act give the Board jurisdiction (a) over the person; (b) over the subject matter; and (c) to grant the necessary remedy; then the Board is a “court of competent jurisdiction” for the purposes of the Charter. [*Lamer J. - Rahey v. The Queen* (1987), 33 C.C.C. (3d), 289 (S.C.C.)]

4. Given the interpretation of the words “court of competent jurisdiction” by the Supreme Court of Canada, it is possible for the Board to be a “court of competent jurisdiction” with respect to a particular section of its governing statute, but not to have the necessary jurisdiction to be a “court of competent jurisdiction” over the subject matter mentioned in another section.

5. Put another way, the issue before us is not simply whether the Board is a “court of competent jurisdiction”. In many instances the Board is a “court of competent jurisdiction” because the Act gives it jurisdiction over the person, the subject matter and the remedy. For example, the Board is a “court of competent jurisdiction” to hold that the reverse onus provisions in the Act do

not contravene the Constitution of Canada. That is so because the legislature has given the Board the express authority to interpret the meaning and effect of those provisions. The narrower issue, the one before the Board in this motion, is whether the Legislature has constituted the Board as a "court of competent jurisdiction" to declare that section 2(b) of the Act contravenes the Constitution of Canada.

6. In section 2 of the Act the legislature tells the Board that it has no authority to apply the provisions of the Act to the labour relations between employers and employees engaged in agriculture. We may not like that restriction. In some cases before the Board, the hearing panel has indicated its displeasure with the situation. Nevertheless, in its wisdom, the Legislature has seen fit to retain the exclusion both after those Board decisions and the enactment of the Charter. The Legislature has continued to reserve to itself the social policy considerations pertaining to employment in the agricultural sector.

7. The Union is forced to shelter under the provisions of the Act when it seeks to ask the Board to declare that section 2(b) is unconstitutional. That very section tells the Board that the Act does not apply when the subject matter is persons "employed in agriculture". When the subject matter is agriculture the Legislature has said that the Board cannot use section 106(1) and section 108 of the Act to give itself jurisdiction and obligate itself to apply section 52 of the Charter. As a result the Board is without jurisdiction to strike down section 2(b) and is not a "court of competent jurisdiction" from whom the Union may seek the remedy under the Charter. It must seek another forum to claim its remedy.

8. I would grant the motion of the Employer and dismiss the application to strike section 2(b) from the Act.

0351-87-R International Union of Operating Engineers, Local 793, Applicant v. Dibblee Construction Limited, Respondent, v. Labourers' International Union of North America, Local 247, Intervener

Bargaining Unit - Certification - Collective Agreement - All employee unit relating to asphalt plant operations of the respondent - Employees in dispute doing preparation work for road construction - Board finding employees working in construction industry and covered by existing collective agreement - Employees not included in bargaining unit - Vote ordered

BEFORE: R. A. Furness, Vice-Chair, and Board Members W. Gibson and R. Montague.

APPEARANCES: Bernard Fishbein and Graham Steers for the applicant; Joseph Liberman and Larry Corlyon for the respondent; no one for the intervener.

DECISION OF R. A. FURNESS, VICE-CHAIR AND BOARD MEMBER W. GIBSON; May 19, 1988

1. This is an application for certification which has been filed under the general provisions of the *Labour Relations Act* and has reference to the asphalt plant operations of the respondent.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in the Township of Kingston, save and except non-working foremen, persons above the rank of non-working foreman, office, clerical and engineering staff and persons for whom any trade union held bargaining rights on May 5, 1987, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. There was a dispute between the applicant and the respondent with respect to the number of employees in the bargaining unit. It was agreed that the following four employees are properly included in the bargaining unit:

Jack Walker	Mechanic
Franklin Leach	Lead Hand
Jack Walker, Jr.	Plant Mixer Man
Charles Wiskin	Leader Operator Asphalt Plant

The parties were not in agreement with respect to whether or not the following employees were to be included in the bargaining unit:

Rene Boulianne
Wally Curtis
Garnet England
Ray Harpell
A.D. Houle
J.P. Ouimet

It was the position of the applicant that these six persons were included in the bargaining unit. The respondent adopted the position that Rene Boulianne was not at work in the shop or plant and that four of the other five persons were covered by a collective agreement (the "Kingston area agreement") which will be referred to subsequently. With respect to A.D. Houle, it was the position of the respondent that he was covered by a collective agreement (the "National Capital Roads Builders Association") which will also be referred to subsequently.

5. At the hearing neither the applicant nor the respondent called witnesses. The applicant and the respondent, however, presented an agreed statement of fact with respect to Messrs. Curtis, England, Harpell, Houle and Ouimet. Facts were presented to the Board with respect to Mr. Boulianne. Both parties apparently surmised that the dispute regarding the number of employees in the bargaining unit for the purpose of the count would be decisively settled by a determination of whether Messrs. Curtis, England, Harpell, Houle and Ouimet were or were not to be included on the list for the purpose of the count. The agreed statement of fact is now set forth.

6. The respondent has three operations which are (i) a quarry operation, (ii) a plant/shop operation, and (iii) a construction operation. The respondent is bound by the Kingston area agreement for its construction operation and this agreement has been renewed. As the road building season comes to an end, employees who are covered by the Kingston area agreement are placed on layoff between the middle and end of October. With the coming of Spring these employees are called back to work some time during the period from the end of March to the beginning of April or even May. These employees do not go back immediately on the road. They are engaged in preparing ("prepping") the machines and equipment that they will use in road building. The Kingston area agreement provides in article 3.08 for the recall of such employees after a seasonal layoff. Four of the five employees referred to in paragraph 5 - Messrs. Curtis, England, Harpell and Ouimet were recalled by the respondent at the beginning of May of 1987 and were given clearance

cards and dispatched by the Belleville office of the applicant. The employees in dispute have been paid at all times in accordance with the wage scales outlined in the Kingston area agreement and dues, benefits and remittances of these employees have been made in accordance with the Kingston area agreement. This has been the practice since at least 1981. The work performed by these employees at the time in question was work which could be characterized as preparatory work on machines and equipment to be used by these employees on road building. Mr. Houle is in a somewhat different position in that his classification as a welder is set out on his clearance card and relates to classifications specified in the Kingston area agreement. However, with his classification as a welder he was paid under the National Capital Road Builders Agreement (the "National Capital agreement"). Mr. Houle was dispatched from the Ottawa office of the applicant and his clearance card has marked on it "recall". Mr. Houle has attached an authorization for union dues and benefits under the National Capital agreement and for other union dues and benefits under the Kingston area agreement. The work in Kingston being done by these employees was not being performed at a road site but rather at the respondent's plant/shop. The employees other than Mr. Houle form part of the construction crew. They were working on machines and equipment that the construction crew would use, that is to say, that the construction crew was preparing machines and equipment to be used by the construction crew. Mr. Boulianne was not present on the date of the making of this application but he falls into the same category as the other employees and was classified as a truck driver - tagalong. He would be employed seasonally, is laid off and is paid and dealt with by the respondent in accordance with the Kingston area agreement. On the date of the making of this application Mr. Houle was not welding a piece of equipment but was welding on the asphalt plant which produces asphalt for the construction season. The other employees were working on a tagalong trailer which would be used by the construction crew. The classifications on the clearance cards match classifications on the Kingston area agreement. The applicant has never positively asserted that the Kingston area agreement applies to the plant/shop operation.

7. It is the position of the applicant that the employees in dispute are not covered by the Kingston area agreement and are appropriate for inclusion in the bargaining unit defined in paragraph three. The respondent takes the position that the employees in dispute are covered by the Kingston area agreement and are therefore not properly included within the bargaining unit defined in paragraph three.

8. The applicant argued that there had been merely a unilateral application or observance of the Kingston area agreement by the respondent and that the mere observance of a collective agreement did not create a collective agreement. The applicant further argued that there was nothing in the Kingston area agreement which related to the plant/shop. The applicant also referred to the language in the National Capital agreement and a collective agreement between the applicant and the respondent with respect to the Board's geographic area number 31 - the United Counties of Dundas, Stormont and Glengarry.

9. The respondent argued that its conduct with respect to the Kingston area collective agreement did not constitute unilateral adherence. The respondent further argued that the employees in dispute were not shop mechanics but were rather operating engineers working on machines for a very narrow period of time and were covered by the Kingston area agreement. The respondent referred to the terms of the Kingston area agreement and the course of dealings involving the parties and the employees who are in dispute since 1981.

10. The mere fact that the terms of a collective agreement such as wage rates and dues deductions are applied to certain employees does not in itself establish that such employees are covered by a collective agreement. In addition, such facts do not mean a trade union has bargaining rights for such employees. See *Ecodyne Limited*, [1979] OLRB Rep. July 629 and *City of*

Kitchener, [1983] OLRB Rep. Sept. 1490. Moreover, an employee can only be in one bargaining unit at any specific point in time. See *Laurent Lamoureux Co. Ltd.*, [1985] OLRB Rep. Nov. 1618. The cases which were cited by the applicant supported its argument that the mere unilateral application or observance of a collective agreement did not create a collective agreement. The Board agrees with these principles. However, the cases relied upon by the applicant were premised upon situations where one of the parties was not actually a signatory or bound by the operation of law to a collective agreement. In the instant application, the Board is not asked to consider active behaviour by one party and passive behaviour by another party. In the instant application the Board is asked to consider the interpretation of a collective agreement which has been executed by the applicant and the respondent. The issue before the Board therefore is not one of active and passive behaviour but rather one of the interpretation of a collective agreement to which the applicant and the respondent are both signatories. The applicant made comparisons between the Kingston area agreement on the one hand and the National Capital agreement and the collective agreement for the Board's geographic area number 31 on the other hand. The Board in the instant application is interpreting the Kingston area agreement and the provisions of the other two collective agreements are irrelevant.

11. Articles 1, 2 and 3.8 of the Kingston area agreement provide as follows:

ARTICLE 1 - PURPOSE

The purpose of this agreement is to establish wages, hours of work, and other working conditions within the sector or sectors of the Construction Industry in which the Employer participates, save and except on Excavations, Site Preparation, Sewer and Watermain work, and Projects governed by EPSCA Agreements, as referred to in Article 23.

ARTICLE 2 - RECOGNITION AND SCOPE

The Company recognizes the Union as the sole collective bargaining agency for all its employees employed in the County of Lennox and Addington, the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, and in Prince Edward County and the Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham save and except non-working foremen and persons above the rank of non-working foremen, office and clerical engineering staff and employees employed at the employer's quarry, shop and plant operations.

ARTICLE 3 - UNION SECURITY AND CHECK-OFF OF UNION DUES

3.8 The employer agrees before recalling to work their present employees after a seasonal layoff, to refer them to the Union Office or Union Representative concerned.

Article 14 sets forth wages and classifications. Article 15 provides for hours of work and overtime and specifically refers to road building. Article 17 provides for reporting time and article 18 provides for travel time and expense allowance. Article 21.3 provides as follows:

ARTICLE 21 - SENIORITY

21.3 Continuous service shall be considered as broken under the following circumstances:

...

b) Senior employees shall not displace junior employees during temporary lay-offs due to equipment being repaired at the shop during months other than December, January, February and March.

12. Continuity of employment with one employer over a period of years is not a normal occurrence in the construction industry. However, in certain types of construction activity such as road building, it is not uncommon for employees to return annually to the same employer for the seasonal work of road building. Since at least 1981, the employees who are in dispute have returned to employment with the respondent and were given clearance cards and dispatched by the applicant. One of the clearance cards, indeed, even has the word "recall" written opposite the heading "Remarks". The Kingston area agreement by its terms applies to the construction industry and there can be no doubt that it applies to the road building operations of the respondent in the Board's geographic areas number 12 and 29.

13. The provisions of the Kingston area agreement are clearly relevant to the seasonal and ongoing nature of the employment by the respondent and its construction crews. The conduct of the respondent in recalling employees, the conduct of the applicant in issuing clearance cards to them and the observance of the terms and conditions of the Kingston agreement as recited to the Board and the fact that the applicant has never positively asserted that the Kingston area agreement applies to the plant/shop operation of the respondent all clearly establish the positions of the applicant and the respondent as being that the employees who were engaged in preparation work were treated and regarded as working in the construction industry and not as shop/plant employees accordingly covered by the terms of the Kingston area agreement. These employees are in truth construction employees who are initially employed as operating engineers on machines for a narrow period of time.

14. The applicant also referred the Board to three cases in support of an argument that the Board has always treated separately shop employees from construction activities and has issued non-construction certificates for such shop employees. It is true that separate certificates have generally issued with respect to such construction and non-construction activities. However, it is quite another matter to determine which employees properly fall within a given bargaining unit. It is such a determination which has involved the Board in this application in the light of the language of an existing collective agreement. The applicant referred the Board to *Fielding Construction Company Limited*, [1970] OLRB Rep. Jan. 1205; *H.J. MacFarland Construction Company Limited*, [1969] OLRB Rep. Feb. 1130; *J. & M. Chartrand Realty Limited*, [1978] OLRB Rep. May 423; and 590308 Ontario Inc., (Board File No. 0915-87-R, unreported decision dated November 26, 1987). The Board observed that the first two decisions were decided prior to *The Labour Relations Amendment Act*, 1970 (No. 2), S.O. 1970, c.85, s.39. The significance of this amendment was noted by the Board in *Esam Construction Limited*, [1980] OLRB Rep. Feb. 197 where the Board stated at page 202:

23. The Board now considers the list of employees for the purpose of the count. Prior to the enactment of *The Labour Relations Amendment Act*, 1970 (No. 2), S.O. 1970, c.85, s.39, the Board excluded shop and yard and other off-site employees from bargaining units which were determined in applications for certification filed under the construction industry provisions of *The Labour Relations Act*. The enactment in 1970, however, introduced a broad definition of "employee" in the construction industry. This definition appears in section 106(b) of the Act. Section 106(b) states [now section 117(b)]:

"In this section and in sections 107 to 124 [now sections 118 to 136],

...

(b) 'employee' includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work of bargaining with on-site employees."

24. In the *Taggart Construction Limited* case, [1974] OLRB Rep. March 190; and the *C.A. Pitts*

Engineering Construction Ltd. case, [1973] OLRB Rep. Feb. 123, the Board considered the provisions of section 106(b) [now section 117(b)]. In those two cases the Board determined that if off-site employees were only rarely, uncommonly and briefly required to work on-site they were not appropriate for inclusion with on-site employees. In the instant application Mr. Chelchowski and Mr. Dunham were not working on the construction site on April 2, 1979. However, these two employees clearly do spend time on the construction site on other days on a regular basis and the Board finds that they are commonly associated in their work with on-site employees within the meaning of section 106(b). The Board therefore includes Mr. Chelchowski and Mr. Dunham on the list for the purpose of the count because they are engaged in either operating or repairing equipment referred to in the bargaining unit.

15. Section 117(b) [formerly section 106(b)] had not been enacted when the first two cases referred to by the applicant were decided. The second two cases were decided after the introduction of section 117(b). However, these two cases did not refer to the application of the provisions of section 117(b) on the facts in those cases.

16. The Board finds that Wally Curtis, Garnet England, Ray Harpell and J. P. Ouimet are covered by the Kingston area agreement and are therefore not included in the bargaining unit defined in paragraph three. The Board further finds that A. D. Houle is covered by the National Capital agreement and is therefore not included in the bargaining unit defined in paragraph three. On the limited evidence before it, the Board finds that Rene Boulianne is also covered by the Kingston area agreement and is also therefore not included in the bargaining unit defined in paragraph three.

17. The list for the purpose of the count consists of the following employees:

Jack Walker
 Franklin Leach
 Jack Walker, Jr.
 Charles Wiskin

The applicant has filed evidence of membership of the type referred to at the hearing on behalf of two of these four employees.

18. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 19, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

19. A representation vote will be taken of the employees of the respondent in the bargaining unit. All those employed in the bargaining unit on the date hereof, who are so employed on the date the vote is taken will be eligible to vote.

20. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

21. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER RENE R. MONTAGUE; May 19, 1988

1. I totally disagree with the majority decision in this case, especially at paragraph 10 of the decision, which I quote:

In the instant application the Board is asked to consider the interpretation of a collective agree-

ment which has been executed by the applicant and the respondent. The issue before the Board therefore is not one of active and passive behaviour but rather one of interpretation of a collective agreement to which the applicant and the respondent are both signatories.

How the majority can put an interpretation on Article 2, Recognition and Scope paragraph 11 in the majority decision is uncomprehendable, when the scope clause clearly excludes the following, and I quote:

Save and except non-working foremen and persons above the rank of non-working foremen, office and clerical engineering staff *and employees employed at the employer's quarry shop and plant operations.*

[emphasis added]

2. With the wording in *this case* in the Recognition and Scope Article, I strongly believe no other interpretation can be placed on the wording but one of *exclusion* from the Kingston area agreement. Therefore, I would have included Wally Curtis, Garnet England, Ray Harpell and J.P. Ouimet in the bargaining unit in this application, as they were:

- (a) employees of the respondent on the date of application; and
- (b) were working for the respondent at the employer's quarry shop and plant operations, and may well have been preparing or fixing their equipment.

Further, one employee on the date of this application Mr. Houle was not welding on any equipment, but was welding on the asphalt plant and I would have found him included in the bargaining unit defined in the majority decision in paragraph 3 and taken whatever action necessary as a result of this application taking the above into consideration.

1825-87-R International Brotherhood of Electrical Workers, Local 105, Applicant v. **Dunmark Electric (Ancaster) Limited**, Respondent v. Construction Workers Local 6 affiliated with the Christian Labour Association of Canada, Intervener

Evidence - Practice and Procedure - Officer inquiring into the list and composition of the bargaining unit - During inquiry parties requesting that inquiry be adjourned to permit Board to hear *viva voce* evidence with respect to a "credibility issue" - Board refusing to interrupt inquiry - Officer directed to continue examination

BEFORE: *Inge M. Stamp*, Vice-Chair, and Board Members *W. Gibson* and *H. Kobryn*.

DECISION OF THE BOARD; May 27, 1988

1. By decision dated March 28, 1988 the Board appointed a Labour Relations Officer to inquire into and report back to the Board on the list and composition of the bargaining unit on the application date, October 2, 1987.
2. On May 18, 1988, during the LRO inquiry, the parties signed a statement requesting

that the inquiry be adjourned to permit the scheduling of a hearing before the Board to hear *viva voce* evidence with respect to a "serious credibility issue".

3. As the Board stated in *Jasper Construction* (unreported decision in Board File #2227-86-R dated December 17, 1986):

5. The Board will neither interrupt nor terminate the authorization of the Board Officer to inquire into and report to the Board on the list of employees and composition of the bargaining unit to permit the [credibility] issue to be brought before the Board for hearing. The potential for a credibility issue with witnesses exists in any matter where parties take opposite views, whether this be in an inquiry being conducted by a Board Officer or in a hearing before the Board. When there is an issue of credibility of witnesses testifying in a Board Officer's inquiry, the Board usually will be able to resolve the credibility problem by scrutinizing the verbatim transcript of the Officer's proceedings, often assisted by the later oral submissions of the parties on the contents of the transcript. In the rare instances where the Board would not be able to resolve a credibility issue, it is always open to the Board to have the witnesses brought before it for an examination of their demeanour during direct testimony before the Board.

4. In *Kaneff Properties Limited*, [1980] OLRB Rep. Nov. 1653, the Board said:

4. The authority of the Board to delegate to its examiners and Labour Relations Officers the power to conduct examinations respecting the duties and responsibilities of individuals or classes of persons, and to conduct examinations respecting the appropriateness of the bargaining unit generally, is found in section 92 [now 103] of the Act which provides, in part:

[103(2)] Without limiting the generality of subsection (1), the Board has power,

(a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;

• • •

(c) to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not;

• • •

(g) to authorize any person to do anything that the Board may do under clauses *a* to *f* and to report to the Board thereon;

• • •

5. By enacting those sections the Legislature has allowed this Board the facility to respond expeditiously to the needs of parties involved in the collective bargaining process. The concern for expedition in certification proceedings is well established (see *Nick Masney Hotels Ltd.* (1970), 70 CLLC ¶14,020 (Ont. C.A.); *Trench Electric Limited*, [1979] OLRB Rep. Apr. 170; *York University* [1976] OLRB Rep. Apr. 187 at 192). Against the need for expedition, the Board must weigh the need for the opportunity to hear all relevant evidence. The procedure of taking evidence before an officer designated by the Board, then providing a report to the Board and the parties in the form of a verbatim transcript of that evidence and allowing all parties the opportunity to make oral submissions on the evidence directly to the Board is the formula, consistent with section 92 [now 103] of the Act, which has been arrived at to accommodate both of those interests.

5. It is for these reasons that the Board will not interrupt the inquiry which it has authorized the Board Officer to undertake. The Board Officer is directed to continue his examination

and the parties are directed to lead all their evidence in front of the Officer, including any evidence on the credibility issue that the parties wish to adduce.

2636-87-R International Brotherhood of Electrical Workers, Local 594, Applicant v. International Brotherhood of Electrical Workers, Local 586, and Ken J. Woods, Respondents v. J.S.H. Mueller Ltd., Intervener

Construction Industry - Union Successor Status - Two locals of same union merged - Officers and members of one local opposed - Employer given status to intervene but not permitted to lead evidence on the consequences of the merger on its business operations - Merger in compliance with union constitution - Constitution not requiring membership approval - Matter set down for further hearing on whether "successor" local deemed to have been recognized as the affiliated bargaining agent as a matter of law

BEFORE: *Michael Bendel*, Vice-Chair, and Board Members *J. A. Ronson* and *A. Hershkovitz*.

APPEARANCES: *Anthony M. Butler* for the applicant; *Chris G. Paliare*, *Terry McEwan*, *Ken Woods* and *Tom Moffat* for the respondents; and *Robert B. Sheppard* for the intervener.

DECISION OF THE BOARD; May 26, 1988

1. This is an application under section 62 of the *Labour Relations Act*, in which the applicant seeks a declaration that the respondent has not acquired the applicant's rights, privileges and duties under the Act by reason of a merger, amalgamation or transfer or jurisdiction. Section 62 of the Act reads as follows:

62.-(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

(2) Before issuing a declaration under subsection (1), the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.

(3) Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

2. The applicant ("Local 594") has been a construction local of the International Brotherhood of Electrical Workers ("IBEW") in the County of Renfrew, based in Pembroke, since 1978. Its Bylaws, approved in accordance with the IBEW Constitution, have recognized this jurisdiction within the IBEW, and Local 594 is referred to in the provincial agreement between the Electrical Trade Bargaining Agency of the Electrical Contractors' Association of Ontario, on the one hand, and the IBEW and the IBEW Construction Council of Ontario, on the other, as an affiliated Local Union, with its geographic jurisdiction being the County of Renfrew.

3. The International President of the IBEW, claiming to act in pursuance of the IBEW Constitution, decided that, effective January 1, 1988, Local 594 would be merged or amalgamated with the respondent ('Local 586'), which is an Ottawa-based local. The reasons for the International President's decision are of little or no relevance from the perspective of the disposition of this application. It should perhaps be mentioned, however, that Local 594 was the smallest construction local of the IBEW in Ontario, with some 60 members, and that, in the opinion of the International President, it was not a viable local. The officers of Local 594 have been opposed to this decision, which would have the effect of terminating the existence of Local 594. The members of Local 594 were consulted by the Local's leadership and they too were opposed to their Local being merged with Local 586. The officers of Local 594 have been refusing to co-operate with the implementation of the merger decision. One of the forms taken by this lack of co-operation was a January 1988 application by Local 594 in the District Court of Ontario for an injunction to prevent Local 586 gaining control of bank accounts in the name of Local 594. The injunction was not granted. Local 594 has applied to the Board for a declaration under section 62 of the Act, asking the Board to declare that Local 586 is not its "successor". The declaration is sought in respect of Local 594's rights, privileges and duties as an affiliated Local Union under the provincial agreement.

4. Local 586 opposes Local 594's application and asks the Board to issue a declaration that it is the successor to Local 594.

5. Ken Woods is the International Vice President, First District, of the IBEW. The First District within the IBEW is Canada. Mr. Woods was the IBEW officer who had responsibility delegated to him by the International President to oversee and implement the merger or amalgamation decision. For that reason, he was named as a respondent in the application. In our view, he is not a proper party to these proceedings, and the application is hereby dismissed as against Mr. Woods.

6. The intervener is an electrical contractor in Renfrew County, which supports the position taken by Local 594.

7. Two preliminary matters should be mentioned at this stage, namely whether the intervener was entitled to status in these proceedings and, if it did have status, whether it could lead evidence on the consequences to its business operations of the merger or amalgamation. Both of these questions were raised by counsel for Local 586 at the outset of the hearing.

8. Counsel for Local 586 objected to the intervener having any status in these proceedings. He noted that the intervener was not named as such in Local 594's application. He argued that section 62 recognized no role for employers in such an application. Although, according to counsel, an employer could be a proper party in a proceeding under section 62 under other circumstances, the issues raised by the present application were strictly internal matters within the IBEW. Finally, counsel maintained that, in any event, the employer's objection to the merger or amalgamation was based on grounds that were irrelevant, namely the possible consequences of the successorship for its business. Reference was made to *Deseronto Public Utilities Commission*, [1977] OLRB Rep. April 248, and *M.L.S. Cable Installations Inc.*, [1987] OLRB Rep. Nov. 1413.

9. After hearing counsel for all parties, including the intervener, the Board ruled against the objection by counsel for Local 586 to the intervener's status in these proceedings. In our view, the intervener's interests are directly affected by the application and cross-application. This is not a strictly internal union matter. At issue in these proceedings is whether the intervener has a bargaining relationship with Local 594 or with Local 586 of the IBEW. Just as, on an application for certification, the employer has status in relation to the question whether the statutory prerequisites

to certification have been met, so too, on the present application, the employer should be allowed to argue, if it wishes to do so, that the alleged "successor" union is not entitled to a declaration to that effect.

10. However, we also ruled at the hearing that we would not allow the intervener to lead evidence on the possible adverse consequences to itself of the application before us, since this was not a relevant consideration for us. The intervener had indicated in its Reply to the Application that it was concerned about the likely disruption of the special working relationship between itself and Local 594 and about the inappropriateness of having a single local responsible for two such geographically and economically distinct areas as Renfrew County and greater Ottawa. It was in relation to these matters that counsel for the intervener had wished to adduce evidence. In *Deseronto Public Utilities Commission*, (*supra*), the Board ruled that concerns of this nature were not relevant to the question whether a declaration should be made under section 62. We endorse the following views expressed in that decision (at page 249):

The matters raised by the respondent are clearly a real concern to it. At the hearing the representative of the applicant sought to address himself to these concerns. The Board's position in all this, however, is merely to ensure that a claimed merger, amalgamation or transfer of jurisdiction has in fact occurred, and it has to then declare what results have flowed from the merger, amalgamation or transfer of jurisdiction. This in turn requires that the Board scrutinize the procedures adopted by the trade unions concerned, with particular emphasis on the procedures adopted by the predecessor trade union, so as to ensure that those procedures conform with the union's constitution (in this case the constitution of the International Brotherhood of Electrical Workers) as well as the law as it has developed in relation to union mergers and amalgamations. (A discussion of certain aspects of the law in this regard is set out in the Board's decision in the *Brewer's Warehousing Company Limited* case, [1974] OLRB Rep. July 461.) Issues such as those raised by the respondent are not relevant to the legal question as to whether or not a purported merger, amalgamation or transfer of jurisdiction has in fact been properly carried out. Further, we are of the view that once the Board is satisfied that a merger, amalgamation or transfer of jurisdiction has been effected, it would be contrary to the purpose and intent of section 54 for the Board to refrain from making a declaration to that effect on the basis of the respondent's concerns. This is not to say that certain aspects of the bargaining relationship between the parties may not undergo change. However the law does recognize that union mergers, amalgamations and transfers of jurisdiction may occur such that a successor union may replace or substitute for a predecessor union in a bargaining relationship with an employer. Necessarily following from this is the fact that an employer may find itself in a bargaining relationship with a union different from that it is accustomed to dealing with, and that this "new" union may possibly adopt policies and procedures different from that of its predecessor.

11. In keeping with this ruling, we also ruled, in the course of the hearing, that, on the basis of its irrelevancy, we would not allow counsel for Local 594 to adduce evidence on the history of relations between Local 594 and other locals of the IBEW or on the possible "dislocation" of Renfrew electrical workers as a result of the merger or amalgamation. This ruling was in response to an objection by counsel for Local 586.

COMPLIANCE WITH THE IBEW CONSTITUTION

12. One of the principal arguments by Local 594 and the intervener was that the merger or amalgamation was not authorized by the IBEW Constitution. The specific allegations presented in this regard can be summarized as follows:

- (a) that Local 586 did not have the jurisdiction under its Bylaws to represent employees in the County of Renfrew;
- (b) that since, under article 15, section 3, thereof, a merger or amalgamation could only be effected in respect of locals in the same "com-

munity or section", the merger or amalgamation of Local 594, a Renfrew County local, with Local 586, an Ottawa local, was not provided for in the Constitution; and

- (c) that the Constitution impliedly required the approval of a majority of members in each of the affected locals before a merger or amalgamation could be effected, and that no such approval had been given.

In the absence of applicable constitutional provisions to effect the merger, counsel argued, the unanimous consent of all of the members of the two locals was required by common law.

13. According to the Bylaws of Local 594, its jurisdiction, in geographic terms, was limited to the County of Renfrew. The evidence indicated that the jurisdiction of Local 586, under its Bylaws, had been limited to the counties of Carleton, Lanark, Prescott and Russell, as well as some counties in west Quebec. However, in anticipation of this merger or amalgamation with Local 594, its jurisdiction appears to have been enlarged to include the County of Renfrew. There was, however, an apparent contradiction in the evidence concerning the amendment of Local 586's Bylaws. On the one hand, the Bylaws of Local 586 that were received in evidence indicate, on their face, that this change in its jurisdiction was "approved" on September 8, 1987. On the other hand, in a letter dated October 23, 1987, the International President stated that he had not yet approved the amendment to the Bylaws of Local 586, although he expressed no doubt about his intention to do so. Under article 17, section 6, of the Constitution, bylaw amendments have to be approved by the International President, failing which they are "null and void". This apparent discrepancy led counsel to question whether Local 586 had the constitutional authority to represent members in the County of Renfrew as of the date of the alleged merger or amalgamation, which was January 1, 1988, or even as of the date of the hearing, in April 1988. The onus, it was argued, was on Local 586 to show that its Bylaws authorized it to represent employees in the County of Renfrew.

14. According to the evidence, the distance from Pembroke, the headquarters of Local 594, to Ottawa, the headquarters of Local 586, is about 160 kilometres. Renfrew County, it was said, is largely rural, while the area within the jurisdiction of Local 586 (prior to its expansion to include Renfrew County) is largely urban. On the basis of this evidence, it was argued that the two Locals were not in the same "community or section", within the meaning of article 15, section 3, of the IBEW Constitution, which reads as follows:

The I[nternational] P[resident] has the right and the power to merge or amalgamate L[ocal] U[nions] in any community or section where the facts, developments or conditions - in the judgment of the I[nternational] P[resident] - warrants (sic) such action, also to decide the terms or details of any merger or amalgamation when the L[ocal] U[nions] involved cannot or do not agree.

In support of the argument that the two locals were not in the same "community", counsel referred, among other things, to article 15, section 6, of the Constitution, which reads, in part, as follows:

Units may be established within a L[ocal] U[nion] by provision in the L[ocal] U[nion] bylaws when its jurisdiction covers more than one city, town or community...

It was also argued that, in view of the many references in the Constitution to "Railroad Councils", the word "section" should be given its normal meaning in a railway context, which (according to Webster's New Collegiate Dictionary (1980)) is a "part of a permanent railroad way under the care of a particular set of men".

15. In support of the contention that article 15, section 3, of the Constitution envisaged a voluntary merger or amalgamation, rather than a forced one, testimony was given by Mr. Patrick Wyse, the president (or former president) of Local 594, who has been active within the IBEW for many years. He testified that, in his experience and to the best of his knowledge, mergers or amalgamations within the IBEW had always been preceded by a vote of the members of the two affected locals. Counsel also referred to article 1, section 2, of the Constitution, which reads as follows:

This organization, in the merging together of all electrical workers in the United States and Canada, fully recognizes the sovereignty of each of our great nations and the advancement of industry capitable (*sic*) with the laws of each country and the objects of this Constitution.

Counsel argued that part of the purpose of this provision was to ensure that Canadian democratic practices and principles would be respected within the IBEW. It was part of Canada's political culture, according to counsel, to hold a vote at the local level before a decision of this kind could be taken. Counsel also noted that the Constitution contained no mechanism for the implementation of a merger or amalgamation against the wishes of a recalcitrant local. This suggested that the Constitution did not envisage "hostile" mergers or amalgamations, but voluntary ones, where the officers of the two locals were willing participants.

16. It is not necessary, in our view, to recite, in any greater detail, counsels' submissions on the question of the alleged non-compliance with the IBEW Constitution, or to quote all of the provisions of the Constitution relied upon. We are satisfied that the decision to merge or amalgamate the two locals, as well as the merger or amalgamation itself, was fully in accordance with the Constitution.

17. In the view we take of these issues, the jurisdiction of Local 586 was extended to cover the County of Renfrew prior to the effective date of the merger or amalgamation. It was argued by counsel for Local 594 and for the intervener that Local 586 had not produced satisfactory evidence of this amendment. In our view, it is abundantly clear from the documentary evidence before us that the International President had every intention to extend Local 586's jurisdiction in anticipation of this merger or amalgamation. We cannot, in these circumstances, attach any particular importance to whether he actually signed a document approving the amendment of the Bylaws. The Constitution permitted the amendment and the political will to amend was obviously present. It would be unduly formalistic for this Board to question the amendment of the Bylaws on the basis of the absence of evidence as to the affixing of the International President's signature.

18. As a result of the amendment of Local 586's Bylaws, Local 586's jurisdiction included the County of Renfrew. Local 586 was thus in the same "community or section" as Local 594 at the material date, with the result that the merger or amalgamation of the two locals was unquestionably provided for under article 15, section 3, of the Constitution. Having reached this conclusion, we do not feel it is necessary for us to express any views on the various arguments advanced about the meaning of the words "community or section" in article 15, section 3, of the Constitution.

19. We disagree with the arguments put to us to the effect that the Constitution impliedly requires the approval of Local 594's members and Local 586's members before a merger or amalgamation of the locals can be effected under article 15, section 5. We are aware of no principle of interpretation that would require, or even permit, us to imply a need for membership approval of a merger or amalgamation, when the Constitution clearly empowers the International President to decide on mergers or amalgamations of locals. We would observe that the Constitution gives some broad powers to the International President in relation to the organization and operation of the IBEW. It would appear to us to be difficult to reconcile a requirement for approval of a merger or

amalgamation by the members of the locals with these broad powers in the hands of the International President. We agree with counsel for Local 586 that it would be unreasonable to interpret the Constitution in the manner advocated by counsel for Local 594 and the intervener as this could lead to a handful of members holding up a merger or amalgamation that was in the interests of the membership as a whole. The testimony of Mr. Wyse to the effect that votes have been held prior to other mergers or amalgamations within the IBEW does not detract in any way from our conclusion that the Constitution does not require such a vote.

20. Two other lines of argument were put to us by counsel for Local 594 and for the intervener which it would be convenient to consider at this stage.

21. The first has to do with the signature of the International President, Mr. J. J. Barry, on some of the documents that were presented in evidence. It was pointed out to us that the signatures were not identical on all of the documents. In the absence of evidence that Mr. Barry had in fact signed these documents, we were asked to refuse to accept them at face value. The consequence of acceding to this request would be that we would be left without any proof that the International President had decided, under article 15, section 3, of the Constitution, that Local 594 should be merged or amalgamated with Local 586, and without any proof that he had approved the amendment of Local 586's Bylaws.

22. We have decided that we should accept all of the impugned documents as having been signed by the International President. These documents were admitted into evidence upon the consent of all parties as to their authenticity. In these circumstances, Local 594 and the intervener might well be estopped from challenging the authenticity of the documents. However, at the very least, even in the absence of estoppel, the onus would be upon Local 594 or the intervener, in these circumstances, to prove that the signatures were not those of the International President. The variations between the various signatures by the International President appear to us to be small. We would require expert evidence to satisfy us that these signatures were not all by the hand of the same person, and no such evidence was presented.

23. The other matter that should be mentioned at this stage is the argument by Local 594 to the effect that the merger or amalgamation had not yet in fact been carried out. Counsel for Local 594 intended to lead evidence to support this argument. He maintained that this was relevant to the question whether a declaration would issue under section 62. Counsel for Local 586 objected to this evidence on the ground of its irrelevancy. The evidence, we were told, would show that Local 586 had not yet paid any of Local 594's bills (e.g. for rent and telephone); had not paid Local 594's office staff or terminated their employment; had not serviced Local 594's pension plan; had not issued any tax receipts for union dues; had not sent newsletters or notices of meetings to Local 594's members; had not referred any of Local 594's members to any jobs; had not been policing the collective agreement in Renfrew; etc. After hearing argument on the subject, we ruled that the evidence in question was of no relevance and we declined to hear it. Our reason for this ruling is that there need only be substantial completion of the transaction before the Board will issue a declaration of successorship. In *The Corporation of the City of Brockville*, [1979] OLRB Rep. Feb. 76, the Board stated the following (at page 79):

The question of whether a merger, amalgamation or a transfer or jurisdiction has been completed must be determined by reference to the facts of each case. Previous decisions indicate that there need only be substantial completion of the transaction in order to obtain a declaration from the Board under section [62].

It appears from a reading of that decision that the two locals in question still maintained separate bank accounts and still voted separately on their own business at union meetings., The Board

referred to these questions, at page 80 of the decision, as “mechanics of the transaction [that] still remain to be done”. The locals’ failure to have completed these mechanical aspects of the transaction by the date of the hearing before the Board did not prevent a declaration from issuing. Similarly in the present case, we are satisfied that the necessary decisions have been taken in accordance with the IBEW Constitution, and all that remains to be done to implement or perfect the merger or amalgamation is to finalize what can be characterized as some of the mechanical aspects of the transaction.

OTHER MATTERS

24. The other principal argument on behalf of Local 594 and the intervener was that a declaration would not be issued under section 62 unless the employees in the affected bargaining unit approved of the transfer of bargaining rights.

25. It would appear that all of the bargaining rights of Local 594 that are the subject of these proceedings are in the industrial, commercial and institutional sector of the construction industry referred to in clause 117 (e) of the Act. A scheme of province-wide bargaining within the electrical industry applies in this sector, which is subject to the provisions of sections 137 to 151 of the Act. No representations were addressed to the Board on the effect, if any, of those provisions on these proceedings.

26. The Board would draw the attention of the parties to subsection 137(2) of the Act, which reads as follows:

Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry referred to in clause 117 (e), except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

We would also draw their attention to clause 202 of the provincial agreement, which reads, in part, as follows:

202 GEOGRAPHIC JURISDICTION

It is understood that the geographic jurisdiction of each Local Union is not subject to negotiation, but is established solely within the IBEW.

27. We have recorded above our finding that the amalgamation or merger was carried out in accordance with the IBEW Constitution. We are thus being asked to rule that Local 586, even though its jurisdiction has been duly extended by the IBEW to include the County of Renfrew, should not be allowed to exercise that jurisdiction since the Renfrew employees are not in agreement with the merger or amalgamation. It would appear to be the effect of subsection 137(2) that Local 586, in the circumstances of this case, is deemed to have been recognized as the affiliated bargaining agent for Renfrew County. The Board has doubts whether an application under section 62 of the Act, in such circumstances, can be reconciled with subsection 137(2) of the Act. These doubts are reinforced, in the present case, by clause 202 of the provincial agreement.

28. Since this aspect of the case has not been the subject of any representations by the parties, we have decided that a further hearing should be scheduled by the Registrar for the purpose

of enabling the parties to address the question referred to by the Board in the preceding paragraph of this decision.

29. The matter is referred to the Registrar.

1041-87-U National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) Local 1967, Complainant v. McDonnell Douglas Canada Limited, Respondent

Interference in Trade Unions - Unfair Labour Practice - Respondent refusing to recognize and deal with grievor in his capacity as president of the complainant - Grievor's discharge currently the subject of an arbitration - Whether collective agreement requiring president to be an employee - Board finding no agreement - Respondent committing unfair labour practice

BEFORE: *Judith McCormack, Vice-Chair, and Board Members W. Gibson and E. G. Theobald.*

APPEARANCES: *B. Chercover, Nick De Carlo, T. Datillo, J. Bettes and M. Khalid for the complainant; J. B. Noonan, S. Duncan, Kevin Moore and P. Holub for the respondent.*

DECISION OF THE BOARD; May 6, 1988

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that the respondent has violated sections 3, 64, 66 and 70 of that Act by refusing to recognize and deal with Nick De Carlo in his capacity as President of the complainant.

2. Many of the facts in this matter were not in dispute. Mr. De Carlo commenced working for the respondent in May of 1979. Between 1983 and 1986 he stood for and was elected to a number of different union offices, including Steward, Chief Steward, Zone Committeeperson and member of the Bargaining Committee. He also ran unsuccessfully for the office of President of the complainant in 1984. In February of 1987, Mr. De Carlo was discharged by the respondent and his discharge is currently the subject of an arbitration pursuant to the terms of a collective agreement in effect between the parties. After his discharge, Mr. De Carlo was again nominated for the position of President of the complainant. He was duly elected to this office and John Bettes, a national representative servicing the complainant, advised Jim Aldridge, Director of Personnel for the respondent, accordingly by a letter dated June 2nd, 1987.

3. At that point, Kevin Moore, the respondent's Manager of Organization, Compensation and Benefits, Paul Holub, the respondent's Manager of Labour Relations and Mr. Aldridge decided that they would not recognize Mr. De Carlo as the President of the complainant, as it was their view that the President of the complainant must be an employee of the respondent. On June 8, 1987 Mr. Holub wrote back to Mr. Bettes, indicating in part as follows:

I wish to make it clear at this time that the terms of the collective agreement require that the president of Local 1967 be an employee of McDonnell Douglas Canada. Mr. De Carlo's present status is that of a discharged employee. As such, he will not be allowed access to the McDonnell Douglas facility. If for some reason that status was to change as a result of the ongoing arbitration hearing dealing with Mr. De Carlo's grievance, the company will review its position at that time.

A brisk exchange of correspondence between a number of persons on behalf of the complainant and the respondent followed, in which the complainant took the position that Mr. De Carlo had been duly elected by the complainant's members and that his presidency was not subject to the respondent's approval or consent. The respondent, for its part, reiterated its view that the President must be an employee of the respondent, and suggested that the complainant appoint an acting President until Mr. De Carlo's status had been resolved.

4. As a result of the respondent's views, the parties agreed that the respondent has refused to allow Mr. De Carlo access to its premises to carry out the functions of the President, going so far as to call the police to escort him from the plant on one occasion when he refused to leave. It has denied Mr. De Carlo the opportunity to attend a health and safety committee meeting (the President is *ex officio* a member of all committees) and initially refused to honour Mr. De Carlo's requests under the collective agreement to release union officials or members of the bargaining unit on union business, or requests for the posting of union notices. The respondent now accepts Mr. De Carlo's requests but is doing so under protest. On one occasion, Mr. De Carlo requested the release of a bargaining unit member to attend a meeting which had been arranged at the complainant's office because the respondent refused to allow Mr. De Carlo on the respondent's premises. The respondent denied this request. The respondent has also refused to deal with Mr. De Carlo with respect to setting up meetings of the pension committee, and has refused to respond to Mr. De Carlo's letters or telephone calls. Instead, all his calls and letters are re-routed to Mr. Holub, who then responds either to Mr. Bettes or to other union officials. Mr. Holub confirmed in his testimony that since Mr. De Carlo's election, the respondent will not even talk to him in his capacity as President of the complainant. In short, counsel for the respondent agreed that the respondent refuses to recognize or deal with Mr. De Carlo in his capacity as President.

5. By the last day of hearing, counsel for the complainant had confined his argument to sections 3 and 64 of the Act. Those sections provide as follows:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

The parties made their argument on the basis that an individual who has been discharged, but whose discharge is being challenged at arbitration is no longer an employee, and we therefore make this assumption without having made a finding in this regard. It was not disputed that the only requirement in the complainant's constitution for standing for election and holding office as the President of the complainant is that an individual must be a member in good standing of the complainant for at least one year, or that Mr. De Carlo qualified in this regard. Similarly, it was not suggested that a discharge would affect a member's standing or that Mr. De Carlo was not duly elected in accordance with the complainant's constitution.

6. As a general proposition, there can be little doubt that a union is entitled to be represented by the individuals of its choice in dealing with an employer. The scheme of collective bargaining set out in the *Labour Relations Act* contemplates an arm's length relationship between two contracting parties independent of one another (see, for example, sections 13, 64, 65 and 67). The

nature of both the employer and the union is that they are entities which can only act through individuals or agents. The selection of those individuals must be free from interference by the other party, or the basic structure of the collective bargaining relationship may be undermined. As a result, the Board has made it clear that a refusal by an employer to recognize a union's chosen representatives on a bargaining committee may result in a finding that the employer has failed to bargain in good faith. (See, for example, *Twin City Laundry Limited*, [1965] OLRB Rep. Jan. 527; *House of Braemore Upholstered Furniture*, [1967] OLRB Rep. Jan. 815; *No-Sag Spring Company Limited*, [1967] OLRB Rep. Mar. 992; *Arnold-Nasco Limited*, [1978] OLRB Rep. July 587; *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309; and *Plastics CMP Limited*, [1982] OLRB Rep. May 726.) In *The Journal*, *supra*, the Board also made these observations with respect to section 56 [now section 64]:

This section protects a union from employer interference with not only the formation, selection or administration of a trade union, but also the representation of employees by a trade union. The structure and composition of the union's bargaining team cannot be determined by the employer. A refusal by an employer to negotiate until the composition of the union's bargaining team is altered, therefore, amounts to a breach of the duty to bargain in good faith - the essence of the wrong being the failure to recognize the union, as represented by its properly constituted bargaining team.

7. Whether or not a representative of a union is an employee is also, generally speaking, irrelevant. The Board has in the past required employers to bargain with committees which include employees of competitors, employees who are not members of the bargaining unit, and employees who have been discharged (see *House of Braemore*; *No-Sag Spring*, *supra* and *High Times Publication Ltd.*, [1984] OLRB Rep. Oct. 1448; see *Marshall-Wells Company Limited*, 56 CLLC ¶15,264 (Supreme Court of Canada) for a case arising from a decision of the Saskatchewan Labour Relations Board). The National Labour Relations Board in the U.S. has taken a similar approach (see *Gates Rubber, Inc.* 199 NLRB 739 (1972) aff'd 493 F. 2d 249; *North American Broadcasting Company* 225 NLRB 25 (1976); *AMF Voit, INC.* 223 NLRB 867 (1976) aff'd 570 F. 2d 1303; *SAS Ambulance SVC* 258 NLRB 459 (1981)). Indeed, it is common for paid staff employees of unions who have no employment relationship with an employer to represent a union, often in conjunction with members of the bargaining unit. In the normal course of events, an employer has no more right to dictate the qualifications or identity of union representatives than the union has with respect to employer representatives.

8. Section 3 and section 64 operate in a complementary manner in this context. The Board noted in *Arnold-Nasco*, *supra*, that section 3 is "not simply a pious, socio-philosophical platitude" but a declaration that requires specific application, that is, to individuals exercising the rights set out in that section. Those rights encompass participation in a union's lawful activities, including standing for and functioning in the capacity of various union offices. The prohibitions in section 64 serve, among other things, to protect those rights by proscribing interference with the administration of a union or the representation of employees by a union.

9. In *Maritime Employers' Association, Montreal, Quebec* [1985] 12 CLRBR (NS) 18, the Canada Labour Relations Board took a similar two-pronged approach when it noted that an employer cannot participate or interfere in the choice of union officers or representatives, citing the importance of an arm's length relationship and the danger of undercutting or weakening the union:

The purpose of s. 184(1) is to protect the exercise of the fundamental rights conferred by the Code, which are set out in s. 110(1):

110.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.

The right to participate in the administration of a trade union and to carry out duties in it is one of the many facets of the fundamental freedoms entrenched in these provisions. The exercise of these freedoms is guaranteed in the Code and safeguarded against interference by the employer, through the prohibitions set out in s. 184(1)(a).

The Board has already interpreted this aspect of the said provision. In *ATV New Brunswick Limited*, (CKCW-TV), [1979] 3 Can LRBR 342, at 346-47, 29 di 23 at 28 (CLRB No. 149), it wrote:

This is directed at the protection of the legal entity, and involves such matters as *election of officers*, collecting of money, expenditure of this money, general meetings of the members, etc. in a word all internal matters of a trade union considered as a business. This is to assure that the employer will not control the union with which it will negotiate and thus assure that the negotiations will be conducted at arm's length.

In a more recent case, *Canadian Pacific Air Lines Ltd.* (1985), as yet unreported Board decision No. 520 [since reported 10 CLRBR (NS) 62], the Board had this to say about s. 184(1)(a) at p. 77:

The provision is also directed at leaving the union free to operate and to do its job on behalf of the persons it represents without improper meddling by the employer in matters that are primarily the concern of the union, meddling that would have the effect of undercutting or weakening the union.

Thus, it has long been recognized that the choice of union officers and representatives is a crucial matter that does not fall within the province of the employer and in which he cannot participate or interfere. Moreover, other tribunals have made similar findings in connection with complaints of refusal to bargain in good faith based on an employer's opposition to a representative or spokesman designated by the union participating in the negotiations.

[emphasis added]

10. While the Ontario cases referred to above involve the failure of employers to deal with particular members of bargaining committees, it is clear that the rationale extends to union representatives acting in other capacities. In the instant case, section 3 provides that Mr. De Carlo is entitled to stand for and function in the capacity of President of the complainant. This entitlement converges with the prohibitions in section 64 in these circumstances where the complainant is the bargaining agent for the respondent's employees. The complainant is entitled to choose who will hold the position of President, and its choice should not be thwarted by the respondent's refusal to recognize Mr. De Carlo in that position. Just as an employer cannot dictate who will or will not represent the union in bargaining, neither can it dictate who will or will not carry out the President's functions.

11. Moreover, the respondent's obligation to recognize and deal with the complainant's chosen representatives does not cease upon the signing of a collective agreement, and both the prohibitions in section 64 and the freedoms in section 3 still operate upon the parties. What does change is that the collective agreement may provide alternate means for the resolution of disputes which also touch upon sections 3 and 64. As a result, the Board may be called upon to decide whether it should defer to the dispute resolution mechanism set out in the collective agreement. This is a question that will turn upon the circumstances of each case (see *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254; *Sunworthy Wallcoverings*, [1986] OLRB Rep. Jan. 164). In this case, a differently-constituted panel of the Board dealt with the question as to whether the Board should defer to grievance proceedings as a preliminary matter, and determined that the Board should hear the

case for the reasons set out in that decision (*McDonnell-Douglas Canada Limited*, Board File No. 1041-87-U, October 20, 1987).

12. It is not necessary for us to consider whether the union's right to select representatives through whom it will act is absolute (see *Maritime Employees Association, supra*, in this regard). In this case the only objection raised to Mr. De Carlo is that the collective agreement requires the President to be an employee. In this regard, the respondent points to the following two articles as indicating such agreement:

Article IV - Section 1

(6) The President of the Local Union, or in his absence, the Vice-President, will be recognized as an ex officio member of all Committees. It is understood that the President shall not be recognized as an additional Shop Steward or Zone Committeeperson, but will have free access to all plants of the Company's operations covered by this Agreement.

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Article XVIII

Section 3 - Letters of Intent

(1) **Group Insurance Coverage for President and full time Financial Secretary of Local 1967**

The company agrees that for the duration of the current Collective Agreement between McDonnell Douglas Canada Ltd. and Local 1967 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC) it will cover the President and the full-time Financial Secretary of Local 1967 for Group Insurance on the condition that Local 1967 reimburse the Company for the required premium.

13. Counsel for the respondent claims that the phrase "[i]t is understood that the President shall not be recognized as an additional Shop Steward or Zone Committeeperson" would be redundant if the President were not an employee, since those positions are "in-plant positions", that is, positions which in practical terms require employees to fill them. It is also argued that the breadth of access provided to the President indicates the parties' mutual understanding that the President would be an employee. Counsel points to section 3 above as confirming this proposition on the basis it indicates that the President will be eligible for group insurance coverage, and hence an employee. It is asserted that these paragraphs indicate together that the parties had agreed that the President must be an employee. However, in the alternative, counsel argues that these provisions create an ambiguity with respect to this issue and he refers to extrinsic evidence which, it is suggested, clarifies that ambiguity. He also relies upon much of the same evidence to show that an estoppel is established against the complainant.

14. The evidence in this regard (both that agreed upon and that adduced) showed that all previous Presidents of Local 1967 since its inception in 1967 have been employees. The access provisions set out in Article IV did not come into being until 1971. The parties agreed that the question of whether a non-employee could be the President of the complainant or hold other union office was not raised by either party in negotiations then, or at any other material time. At one time five employees, who included members of the bargaining committee and the plant chairman, were discharged by the respondent. Subsequent to their discharge, some of those individuals were re-elected to the positions of plant chairman and member of the bargaining committee. The respondent at that time took the position that they could not hold these positions unless they were employees. The complainant objected to the respondent's position and asserted to the contrary. The individuals involved fulfilled their terms of office, although alternates were appointed by the complainant for them. In 1975, one individual whom the parties agreed was no longer an employee

as a result of his discharge ran unsuccessfully for the office of President. The respondent was aware of this fact and was also aware that the only qualification for such office was membership in good standing in the complainant. Mr. Moore further acknowledged that the respondent knew that a discharge would not affect an individual's membership in good standing.

15. Considerable evidence was also adduced with respect to the security arrangements for the plant. However, it was not suggested that the respondent could not accommodate Mr. De Carlo's official functions in a meaningful way, whether or not he was an employee. In fact, it appears that the respondent has done so since the Board's interim order pursuant to section 82 of the Board's Rules of Procedure in this matter. (*McDonnell Douglas Canada Limited*, Board File No. 1041-87-U, November 27, 1987. At the time the Board made this order, the respondent had agreed to recognize Mr. De Carlo in his capacity as President. When these hearings resumed, that agreement was withdrawn.) Rather, this evidence appeared to be directed at the improbability of the respondent agreeing to the current access provisions in the collective agreement for the President had it contemplated a non-employee's holding that office.

16. We do not accept the argument that the clauses cited make it clear the parties agreed that only an employee could hold the office of President. Certainly they contemplate that the President *may* be an employee; however, we find no indication that the President is *required* to be an employee. Neither did we find the comparisons drawn with other collective agreements to be useful. Nevertheless, taking the respondent's case at its highest and assuming, without finding, that an ambiguity is raised in this regard, we do not find that the evidence adduced either resolves that ambiguity or raises an estoppel. It is not surprising that the five previous Presidents of the complainant have been employees, given that the complainant is a single plant local at the present time. This does not in our view, amount to a representation or an implied understanding that the President must be an employee. The parties agreed that the issue was never discussed in negotiations and the other evidence is simply inconclusive. While the complainant has appointed alternates for some employees holding other union offices who lost their employee status, it has never done so for the office of President. The other offices for which alternates were appointed are particular to the employer, such as Plant Chairman, and the practical exigencies of the functions performed may well suggest that it would be difficult for non-employees to hold them, although we make no finding in this regard. However, the evidence indicates that the complainant's local structure means that the local President may not necessarily be attached to a particular plant. In the past, a predecessor local representing the respondent's employees has encompassed other plants and employers, and the present local may well do so again in the future. A sister local of the complainant represents office, technical and professional employees of both the respondent and two other industry employers, and the local President may be drawn from any one of the three. In other words, the respondent has been called upon to deal with non-employees in the position of President of this sister local. The respondent has no say and plays no role with respect to whether the complainant is a single plant local or an amalgamated local.

17. It may well be that the respondent assumed that the local President would be one of its employees. However, this seems a tenuous assumption, given the qualifications for standing for this office in the complainant's constitution and the local structure, both of which the respondent acknowledged it was aware. In addition, such an assumption was, at best, a unilateral one. In our view, the parties simply did not turn their minds to this issue in any mutual fashion, and the evidence adduced falls short of either resolving any ambiguity in the collective agreement or establishing an estoppel. We conclude that there was no agreement in this regard, either in the collective agreement or otherwise. As a result, it is unnecessary for us to address the complainant's argument that such an agreement would be impermissible under the Act.

18. There can be little doubt that the respondent's conduct amounts to a significant interference in the administration of the complainant. Aside from the fact that the latter's duly elected President has been prevented from or impeded in the carrying out of his duties, we also accept that such conduct may have more subtle ramifications, including undermining both the complainant and this particular President in the eyes of employees and having an impact on subsequent elections. Indeed, it is unnecessary to belabour this point as the respondent did not suggest otherwise.

19. For the foregoing reasons, we find that the respondent has violated section 64 by its refusal to recognize and deal with Mr. De Carlo in his capacity as President of the complainant.

20. At the time the parties made their arguments, counsel for the complainant requested by way of relief a declaration that the respondent had violated the Act, a direction to cease and desist in this regard, and the posting of notices in the workplace. The Board was asked to remain seized with respect to the other remedies requested in the complaint. In light of our findings, and pursuant to section 89(4) of the Act, the Board:

- a) declares that the respondent has violated section 64 of the *Labour Relations Act* by refusing to recognize or deal with Nick De Carlo in his capacity as President of the complainant;
- b) directs that the respondent cease and desist from refusing to recognize and deal with Nick De Carlo in his capacity as President of the complainant;
- c) directs that the respondent cause copies of the attached notice marked "Appendix" (as supplied by the Board) to be signed by a representative of the respondent and posted in conspicuous places on its premises where they are likely to come to the attention of the employees represented by the complainant, and keep such notices posted for sixty working days, and take all reasonable steps to ensure that the notices are not altered or defaced or covered by any other material.

21. As a result of these orders, the Board's interim order is hereby terminated. The Board remains seized for the purposes of implementation and the determination of further remedies, if appropriate.

Appendix
Labour Relations Act

505

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY REFUSING TO RECOGNIZE AND DEAL WITH NICK DE CARLO IN HIS CAPACITY AS PRESIDENT OF CAW-CANADA LOCAL 1967.

UNDER THE LABOUR RELATIONS ACT EMPLOYEES ARE ENTITLED TO JOIN A UNION OF THEIR CHOICE AND PARTICIPATE IN ITS LAWFUL ACTIVITIES. AN EMPLOYER IS NOT PERMITTED TO INTERFERE WITH THE REPRESENTATION OF EMPLOYEES BY A UNION.

WE ASSURE ALL OF OUR EMPLOYEES THAT WE WILL NOT DO ANYTHING THAT INTERFERES WITH YOUR RIGHTS UNDER THE LABOUR RELATIONS ACT, AND THAT WE WILL RECOGNIZE AND DEAL WITH YOUR UNION REPRESENTATIVES, INCLUDING MR. NICK DE CARLO IN HIS CAPACITY AS PRESIDENT OF LOCAL 1967.

McDONNELL DOUGLAS CANADA LIMITED

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 6TH

day of MAY

• 19 88 •

2830-87-U: Leopold Morin, Complainant v. Canadian Auto Workers National Union and Local 222 Oshawa, Respondents v. General Motors of Canada Limited, Intervener

Duty of Fair Representation - Unfair Labour Practice - Union negotiating a collective agreement which reduced the automatic retirement age from 70 to 65 - No breach of fair representation duty - Union taking all relevant interests into account - Not every adverse impact results in a violation of the duty

BEFORE: Rosalie S. Abella, Chair.

APPEARANCES: Paul Morin, Michael Johnston and Brian King for the complainant; John Moszynski, Robert Nickerson, Pat Clancy and John Sinclair for the respondents; E. T. McDermott and Jay Wilber for the intervener.

DECISION OF THE BOARD; May 30, 1988.

1. The complainant, Paul (Leopold) Morin, alleges that the respondents, the Canadian Auto Workers National Union (C.A.W.) and Local 222, have violated the duty of fair representation required by section 68 of the *Labour Relations Act* in negotiating a collective agreement in 1987 with the intervener, General Motors of Canada Limited (G.M.) which reduced the automatic retirement age from 70 to 65. It was the reduction to 65, rather than the fact of a fixed retirement age which formed the substance of his complaint. The essence of Morin's complaint is that the age reduction was arbitrary, discriminatory, and in bad faith, because, among other reasons, the age limit has no effect on Quebec workers at G.M. since mandatory retirement cannot be enforced under Quebec law. According to Morin, therefore, the alteration of the age to 65 by the C.A.W. has an adverse impact on Ontario workers and because this was a foreseeable disparity, ought not to have been negotiated by the union. He was not concerned about this disparity when the retirement age was 70.

2. Morin has been an employee at the G.M. Oshawa plant for 23 years and was at all times a member of the U.A.W. and its successor, the C.A.W. He is employed as a Millwright, part of the Skilled Trades Group of the Local. He had not actively participated in the union until he was elected in March of 1987 to the position of alternate committeeman. He is 65 years old.

3. The provision of the collective agreement alleged by Morin to offend section 68 of the Act is section 55. It reads:

Effective with the effective date of this Agreement and until September 30, 1988 management may terminate the employment of any employee on or after the first day of the month following the month in which such employee's seventieth (70th) birthday is reached. Effective October 1, 1988 and thereafter Management may terminate the employment of any employee on or after the first day of the month in which such employee's sixty-fifth (65th) birthday is reached. Any such termination shall break such employee's seniority.

Although the language used suggests that termination at age 65 is permissive, both the C.A.W. and G.M. acknowledge that it has historically been interpreted as a mandatory provision.

4. As an alternate committeeman, Morin said he kept himself informed of developments in negotiations underway between the C.A.W. and Ford, Chrysler, as well as G.M. He was aware of the pattern bargaining tradition whereby the C.A.W. designated one of these three companies as its "target company" on the understanding that any agreement concluded with the first company

would set the pattern for the other two. For the 1987 bargaining round, the C.A.W. decided in September that the first set of negotiations would be with Chrysler. After a highly publicized four day strike, the C.A.W. ratified an agreement with Chrysler on September 19th and 20th. The major thrust in bargaining had been achieved, namely the substantial improvement of benefits for current and future retirees and, in particular, inflation protection for these workers through indexation. On October 3rd and 4th, an agreement with Ford was ratified on virtually identical terms as the provisions in the Chrysler agreement.

5. In accordance with its usual practice, the C.A.W. prepared and issued thousands of copies of a newsletter for employees to review at the ratification meetings. These newsletters, released in September for Chrysler and in October for Ford, outlined and explained the terms of the agreement. On the front page of both of these newsletters, C.A.W. President Bob White explained the significance of the agreement as follows:

We have made the largest improvements in pensions, both for current and future retirees, in our history. We have been successful in negotiating cost-of-living increases in pensions for future retirees. For current retirees, we made pension improvements in all categories and negotiated periodic increases over the life of the six-year pension agreement. . . .

This agreement will allow our older members to retire with a decent income, significantly protected against inflation, thus improving the job security of younger members.

On page 3 of each of these newsletters, there is a bold-faced headline called "mandatory retirement" with the following explanatory paragraph:

Mandatory retirement

The automatic retirement age has been changed from 70 to age 65. Those who are 64 or more are allowed one more year before they must automatically retire.

6. Morin stated that he had heard rumours in September and October about the indexed pensions and the mandatory retirement provisions, including rumours that the retirement age had been reduced to 58 and 62. He paid no attention to these rumours, he said, and asked no one about their veracity because he did not take them seriously.

7. The ratification meetings for G.M. took place on October 24th and 25th. There were two meetings scheduled for October 25th, the first at 10:00 a.m. for Production Workers to which all union members were invited, and the second only for Skilled Trades Group members at 1:00 p.m. Morin attended only the afternoon session even though he knew that at the morning session all generic benefit and contract provisions would be explained, because he said he was only interested in what had been achieved for the Skilled Trades. Although the C.A.W. had distributed 20,000 copies of its newsletter to employees, Morin said he did not see a copy of it until after the ratification meeting. Nor, he says, did anyone at the afternoon meeting discuss the mandatory retirement clause either from the platform or by way of questions from the floor. He does not rely, however, on his not having seen the newsletter at the ratification meeting, or not having sufficient notice of the issues; rather, it is his contention that the age reduction itself from 70 to 65 inherently violates section 68 of the Act. By secret ballot, the overall vote in favour of the G.M. agreement was 89%, with 92% of the Production Workers and 77% of the Skilled Trades workers in favour.

8. According to Bob Nickerson, Secretary-Treasurer of the C.A.W., proposals for the 1987 round were developed through a Collective Bargaining Convention held every three years in accordance with the C.A.W. constitution. 244 delegates were elected to this Convention and were numerically representative of the numbers of members they represent. The Oshawa local had four elected delegates. In addition, the heads of each of C.A.W.'s 510 locals were entitled to attend.

The purpose of the Convention was to develop a "wish" list that eventually would form the basis of master collective agreement bargaining proposals, based on amendments and suggestions that had been forwarded to the C.A.W. executive over the previous three years. These suggested amendments were distributed by topic to various committees weeks before the Convention for the committees' recommendations. The Skilled Trades Group drafted a separate document with suggestions for amendments to the local agreements.

9. At the 1987 Collective Bargaining Convention, it was agreed that inflation protection for retirees would be a high priority, a goal no other union had achieved in Canada. To achieve it within the C.A.W., it was agreed that the support of younger as well as older workers was necessary. In balancing the competing needs and interests of all workers, it was agreed at the Convention that to obtain support from C.A.W. members for substantial increases and inflation protection in pensions, measures that would necessarily reduce to some extent the quantum of available money for wages and other benefits, it would be necessary to provide an inducement to younger workers. The inducement unanimously agreed to at the national Convention was the reduction of the mandatory retirement age to 65 and greater job security. The implementation of the age reduction to 65 was delayed by one year to give 65 year old workers "a one year grace period".

10. Inflation protection and improved pensions became the major platforms in bargaining with Chrysler, and the brief strike reflected the significance to the C.A.W. of being able to achieve their implementation. The Chrysler collective agreement ultimately incorporated the objective by raising the pension benefits from \$22.05 to an eventual \$36.00 per-month-times-years-of-service for retirees and providing 90% inflation protection, with an upper limit to ensure that former retirees would not receive more than future retirees. The same gains were achieved in the Ford and G.M. settlements.

11. Nickerson acknowledged that the mandatory retirement provision has not been applied in Quebec because it cannot be in the face of the relevant provincial law. Section 10 of the C.A.W. constitution, guaranteeing every member of CAW-Canada equal treatment, deals with race, sex, creed, colour, marital status, sexual preference, disability, political or religious affiliation and place of origin, but does not refer to age. Even before the 1987 agreements, some Locals had retirement ages of 65, and others had ages other than 65 or 70. Evidence given by G.M. indicates that the automatic retirement age in its collective agreements with the U.A.W. and C.A.W. from 1953 - 1968 was 69 or 68, depending on entitlement to other benefits, 68 from 1968 until 1979, and 70 from 1979 until 1987.

12. Section 68 states:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Simply put, this section obliges a union to act in a manner which is objectively rational, equitable in process and substance, and benignly motivated. The section 68 duty to represent employees fairly flows from the recognition that union representation truncates the capacity of individual employees to negotiate their own employment contracts with their employer. The sovereignty of the individual is traded for the benefits derived from collective representation, benefits logically and logically presumed to be better achieved when individuals act in concert. This economic equation - pluralistic pressure enhancing the possibility of improved concessions from employers - forms the historical basis for collective bargaining.

13. Although section 68 primarily represents a deferential approach to union policies and practices, these are nonetheless subject to scrutiny. In balancing the competing claims and interests of the persons it represents, the union acts in a quasi-fiduciary role, and must act and be seen to act in a manner free from arbitrariness, discrimination or bad faith. Given the heterogeneity of concerns in any given bargaining unit or union, it will not always be possible to achieve consensus or even majority approval. But so long as the union has considered the alternatives, duly weighed the competition of concerns, and made its decision rationally and in good faith, its conduct will not violate section 68.

14. In this case, the C.A.W., through its elaborate and broadly representative Collective Bargaining Convention, decided that improved and indexed pensions would form the primary plank in its bargaining strategy with the "three auto giants" in 1987. It understood that the achievement of this objective, as necessarily reducing the global economic package available for other demands, might have less appeal to its overall workforce as a singular platform without a countervailing inducement. The inducement arrived at was greater job security for younger workers and a reduction of the automatic retirement age from 70 to 65. Not only was the measure not designed to impact adversely on older workers, it was devised to provide them with improved financial security on their retirement. The C.A.W.'s strategic calculation proved highly successful with the overwhelming majority of its workforce at Chrysler, Ford and G.M., and a milestone was achieved in the negotiation of indexed pensions for current and future retirees.

15. Of the 43,000 workers at G.M. in Canada, including 18,000 in Oshawa and 2,800 in Quebec, 271 were over 65. By itself, the issue of majoritarian approval is not determinative. There are conceivably union issues or policies which may well satisfy the majority but nonetheless violate the duty fairly to represent all employees, including the concerns of a minority of them. Majority support cannot insulate union policies or decisions from Board censure if they are arbitrary, discriminatory, or in bad faith.

16. There is no doubt that those employees outside Quebec who are 65 or over are now, with one year's notice, expected to retire earlier than under the previous collective agreement. But the fact that the retirement age has changed does not necessarily mean that there has been discrimination within the meaning of section 68. The term discrimination in human rights has itself undergone a metamorphosis over the past 15 years, expanding its reach to embrace systemic concepts. But what has not changed is its intrinsic character - it is the antithesis of fairness. In a labour relations context, discrimination means that the union is not entitled to behave, either procedurally or substantively, in a way which disregards the rights of the employees it represents to be free from proscribed motives or effects. What is proscribed in the circumstances must ultimately be measured by an objective barometer, bearing in mind the political and economic exigencies of the situation faced by the union. In a human rights context, the term "discrimination", may be tautological with the terms "arbitrary" and "bad faith". But what is discriminatory in a human rights sense may or may not also be discriminatory within the meaning of section 68. And just as it is that not every case of adverse impact leads to a finding of discrimination in human rights - the definition of discrimination containing as it does its own inherent limits - so it is that not every adverse impact results in a violation of section 68. This is particularly significant when the character of a union as a creature of collective interests is understood. It will necessarily be the case that not every concern of each individual can be consistently accommodated. Section 68 does not, however, provide a vehicle by which the Board may, without restraint, substitute its own preference or opinion as to the union's course of conduct; it must simply be satisfied that all relevant interests have been weighed and that the union has made an honest judgment in the circumstances.

17. In this case, all such interests were clearly taken into account, including the difference

in Quebec law. The existence of specific local laws to which collective agreement terms may be subject does not preclude a union from developing policies of more general application. The C.A.W., in accordance with its constitution, decided to attempt to bargain for improved benefits for older workers, and to do it, offered greater job security to its younger members as an incentive. These are precisely the kinds of 'hard choices' unions are called upon and expected to make in their own and their members' interests. Far from disregarding the concerns of those who were 65 or older, the C.A.W., in seeking and being mandated to protect vigorously, even to impasse, some of these long term older workers' economic interests, decided of necessity that it could best do this by conceding others. It weighed the right to work until an older age against the right to greater economic security after retirement at whatever age, and chose, on balance, to protect its members from the financial repercussions of a fragile pension on retirement. In so doing, it was neither arbitrary, discriminatory, nor acting in bad faith.

18. For all the foregoing reasons, this complaint is dismissed.

2590-87-R; 2974-87-R International Union of Operating Engineers, Local 793, Applicant v. **Peter Kiewit Sons Co. Ltd.**, Respondent v. Group of Employees, Objectors; Labourers International Union of North America, Ontario provincial District Council, Applicant v. Peter Kiewit Sons Co. Ltd., Respondent v. International Union of Operating Engineers, Local 793, Intervener #1 v. United Brotherhood of Carpenters and Joiners of America, Local 38, Intervener #2

Certification - Constitutional Law - Construction Industry - Respondent contracting with St. Lawrence Seaway Authority to rehabilitate portions of the Welland Canal - Whether employees of the respondent engaged in construction falling within provincial jurisdiction - Board having jurisdiction to entertain certification application

BEFORE: *R. A. Furness, Vice-Chair, and Board Members W. A. Correll and T. Theobald.*

APPEARANCES: *David A. McKee, Jack J. Slaughter and J. Anderson* for the applicant and intervener #1; *Daniel J. Shields, Alex Drummond and Dan Old* for the respondent; *L. A. Richmond, B. Suppa, J. Mancinelli, H. Mancinelli and N. Scibetta* for the Labourers International Union of North America, Ontario Provincial District Council; *David A. McKee and Arthur Varty* for intervener #2; no one appearing for the objectors.

DECISION OF THE BOARD; May 18, 1988

1. The name of the respondent is amended to read: "Peter Kiewit Sons. Co. Ltd.".
2. The applicants have each applied for certification. At the commencement of the hearing counsel for the Labourers' International Union of North America, Ontario Provincial District Council ("the Provincial Council") informed the Board that; even though he disputed the status of the International Union of Operating Engineers, Local 793 ("Local 793") to participate in these proceedings and was of the view that these proceedings ought to be combined; it was his position that the Board could deal with a constitutional issue which has been raised with by the respondent. All of the other parties agreed that the Board could and ought to deal with the constitutional issue

initially. The Board ruled that it would hear and decide the constitutional issue. This ruling was made without prejudice to the objections raised by counsel for the Provincial Council.

3. It was the position of the respondent that its operations in connection with the rehabilitation of the West Lock Wall Face of Lock No. 2 at the Welland Canal ("the Canal") in St. Catharines, Ontario, were an integral part of the operation of a federal undertaking and that the Board was without jurisdiction to entertain these applications. The Provincial Council and Local 793 adopted the position that the Board had jurisdiction to entertain these applications. The Board heard evidence from Daniel Old the respondent's job superintendent on the Canal.

4. The respondent is a federally incorporated company and has a contract with The St. Lawrence Seaway Authority (the "Authority") which essentially involves the rehabilitation of portions of the Canal. The Authority is an agency of the federal government and in the contract there is an Appendix "D" which is entitled "Labour Conditions". Appendix "D" contains the following provisions:

Interpretation

1. In these conditions

- (a) "Act" means the *Fair Wages and Hours of Labour Act*;
- (b) "Regulations" means the Fair Wages and Hours of Labour Regulations made pursuant to the Act;
- (c) "contract" means the contract to which these Labour Conditions are attached;
- • •
- (e) "contractor" means the person who has entered into the contract with the contracting authority;
- (h) "Minister" means the Canada Minister of Labour;

Wage Rates

2.

- (a) All persons in the employ of the contractor, sub-contractor, or any other person doing or contracting to do the whole or any part of the work contemplated by the contract shall during the continuance of the work be paid fair wages that is such wages as are generally accepted as current for competent workers in the district in which work is being performed for the character or class of work in which such workers are respectively engaged: the wage rates paid for each classification of work shall be no less than those set out in Appendix "A" to these Labour Conditions, and in no case shall the wage rates paid be less than the minimum hourly rate of pay prescribed by or pursuant to Part III of the Canada Labour Code (Labour Standards).

Hours of Work

3.

- (a) Except as provided in paragraph (d) and Section 13, the working hours of persons employed in the execution of the contract shall not exceed 8 hours

in a day or 48 hours in a week except where longer daily or weekly hours are authorized by the Minister in cases of exceptional circumstances.

- (b) Except as provided in Section 13, all persons shall be paid for hours worked in excess of 8 hours in a day or 40 hours in a week at an overtime rate of at least one and one-half times the wage rates required to be paid under these Labour Conditions as set out in Section 2(a).
- (c) Except as provided in Section 13, all applications for permission to exceed 8 hours in a day or 48 hours in a week shall be made to the contracting authority for reference to the Minister.

5. On November 24, 1987, Labour Canada mailed the following letter, which was received by the Authority:

November 24, 1987

Miss V. C. Durant
 Secretary
 The St. Lawrence Seaway
 Constitutional Square
 Suite 1400, 360 Albert Street
 Ottawa, Ontario
 K1R 7X7

Dear Miss Durant:

OVERTIME PERMIT

FAIR WAGES AND HOURS OF LABOUR ACT

Reference:	Your letter dated November 5, 1987
Contractor:	PETER KIEWIT SONS CO. LTD.
Nature and	Rehabilitation of West Wall
Location of Work:	Face, Local 2 (1987) Welland Canal, Seaway, Western Region

The Minister of Labour has approved the application for an overtime permit with respect to work performed during the continuance of the referenced contract.

All persons in the employ of the contractor, sub-contractor, or any other person doing or contracting to do the whole or any part of the work contemplated by the contract, may, during the continuance of the contract, work a maximum of 11.00 hours in any day and a maximum of 77.00 hours in any week, and no person shall be required or permitted to work in excess of these hours.

Notwithstanding the extension of maximum hours, all persons required or permitted to work in excess of standard hours applicable to the reference contract (i.e. 8.00 hours in any day and 40.00 hours in any week) shall be paid for the overtime at a rate of wages not less than one and one-half times the rate of fair wages required to be paid under the contract.

The contractor shall keep accurate records showing the names, trades and addresses of all persons in his employ and the wages paid to and the actual time worked by such persons, and the records shall be open for inspection by the Labour Affairs Officers of Labour Canada at any time it may be expedient to the Minister of Labour to have them inspected.

The prime contractor shall be responsible for informing all sub-contractors of the conditions set out herein and shall be held responsible for the strict adherence to the conditions on the part of the sub-contractors.

This permit is in effect from September 22, 1987

Yours truly

“M. Valiquette”
Regional Director
Great Lakes Region

On December 3, 1987, the Authority sent the following letter to the respondent:

December 3, 1987

Peter Kiewit Sons Co. Ltd.
1183 Finch Ave. West
Suite 201
Downsview, Ontario
M3J 2V8

Attention: Mr. D. Old, P. Eng.

Dear Sir:

Reference: Contract 12-2072 - Rehabilitation of West Lock Wall, Face, Lock 2 (1987), Rehabilitation Program, Welland Canal, Seaway Western Region

This will acknowledge your letter of November 5, 1987 in which you requested permission to work in excess of the hours established by the provisions of the Fair Wages and Hours of Labour Act on Contract No. 12-2072.

Attached is a copy of the permit issued by the Department of Labour authorizing you to work a maximum of seventy-seven (77) hours per week and eleven (11) hours per day.

Yours truly,

Glen P. Carlin, P. Eng.
Civil Engineer

6. It was necessary for the respondent to require its employees to work in excess of forty hours per week due to the requirements to schedule the work on the Canal. The work on the Canal is concrete demolition and involves plastering, anchoring and refacing the crest wall of Lock No. 2. A portion of the wall of Lock No. 2 is blasted by dynamite. This leaves a much thinner, by about three feet, section of concrete. Reinforcing steel is then driven into the concrete walls. Some new concrete forming work is required and a small amount of excavating is done in connection therewith. The respondent is a privately owned corporation and is not an agency of either the federal government or any provincial government and does not operate the Canal or any part of the Authority. In accordance with the laws of Ontario, there is a health and safety representative on the Canal and the respondent is complying with the *Workers' Compensation Act* of Ontario with respect to its seventy to seventy-five employees who are working on the Canal. The work of the respondent on the Canal is inspected by safety inspectors from the Ministry of Labour of Ontario and the respondent agrees that the Ministry of Labour of Ontario has authority over the work on the Canal.

7. Under the terms of the contract with the Authority, the respondent is required to procure and has procured its manpower from local sources. While the respondent procured its manpower from local sources as much as possible, some of its employees have travelled from Alberta and Saskatchewan. The respondent has also engaged the services of private subcontractors from

various locations in Southern Ontario. While the respondent is primarily involved in heavy engineering projects it has divisions which undertake different forms of construction such as roads, excavations, airport runway resurfacing, power houses and earth dams.

8. It is the position of the respondent that the work in question is being done on a federal undertaking and that the federal government has exercised its jurisdiction and is regulating the labour relations of the respondent and has effectively occupied the field. The respondent argued the doctrine of paramountcy and reasoned that since the federal government has occupied the field, therefore, federal legislation ought to be applied and not provincial legislation. The position of the respondent, however, does not take into account that the field of labour relations is not an overlapping field and that there is no basis for saying that the field has been occupied by the federal government. In *Tennant v. Union Bank of Canada*, [1884] A. C. 31, Lord Watson stated that the legislation of the Parliament of Canada, so long as it relates strictly to matters within the enumerations in section 91 of what is now called the *Constitution Act 1867* is of paramount authority. The field of labour relations however is not a shared jurisdiction and there is a line between federal and provincial jurisdiction in labour relations.

9. It is now well settled that as a general proposition of law the provinces have exclusive jurisdiction over labour relations matters. See *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396. By way of exception, Parliament has jurisdiction over labour relations if such jurisdiction is an integral part of its primary competence over some federal subject matter. See *In the Matter of a Reference as to the Validity of the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529. Therefore, there can be no doubt that notwithstanding the fact that labour relations is generally a matter of provincial jurisdiction, Parliament has jurisdiction over the labour relations of employees who are engaged in the operation of the Canal. The issue before the Board in the instant case is whether the employees of the respondent engaged in construction work on the Canal come within provincial jurisdiction or federal jurisdiction.

10. Earlier decisions of this Board in *Robertson-Yates Corporation Limited*, [1962] OLRB Rep. Oct. 215 and in *Schwenger Construction Limited*, [1965] OLRB Rep. Feb. 576, the Board held that the labour relations with respect to certain types of construction fell within federal jurisdiction. In *Robertson-Yates Corporation Limited, supra*, a general contractor was engaged in the construction of a number of structures at the Canadian terminus and approaches at Niagara Falls, Ontario, including a port of entry into Canada with customs and immigration installations, the customs compound and warehouse, toll lanes and toll booths. In *Schwenger Construction Limited, supra*, a general contractor was involved in the twinning of Lock 2 on the Canal and in determining that the labour relations of the employees of such a general contractor fell within federal jurisdiction, the Board followed the decision of the privy council in *CPR v. The Corporation of the Parish of Notre Dame de Bonsecour*, [1899] A.C. at 367. However, these cases were decided before the decision of the Supreme Court of Canada in *Construction Montcalm Inc. v. Minimum Wage Commission et al., infra*. In the light of the decision of the Supreme Court of Canada in that case, the two other decisions of the Board referred to in this paragraph must now be taken to have been incorrectly decided.

11. The issue is whether the employment relations between an identifiable employer and its employees is, in fact, a federal undertaking or is so integral to another federal undertaking as to require the federal government to regulate the employment so as to fully regulate the undertaking. The work performed on the Canal is similar to other types of construction. Employees may be employed by the respondent on construction work in Ontario, Alberta or Saskatchewan and there is no distinction between the work required on the Canal and other jobs. It appears to the Board that similar skills are required from skilled tradesmen for various types of construction. The

employment relationship does not change simply because of the nature of the work on which the labour is being expended. The test to be applied is whether the work is so integral to the federal undertaking that it must be regulated by the federal government, otherwise the federal government will lose its ability to regulate the primary concern, that is to say, the Canal. The Supreme Court of Canada dealt with an analogous issue in *Construction Montcalm Inc. v Minimum Wage Commission et al.*, [1979] 1 S.C.R. 754 where Beetz, J. stated as follows at pages 773-776:

In the case at bar, the impugned legislation does not purport to regulate the structure of runways. The application of its provisions to *Montcalm* and its employees has no effect on the structural design of the runways; it does not prevent the runways from being properly constructed in accordance with federal specifications; nor has it even been shown, assuming it could be, that "the physical condition" of the runways, as opposed to their structure, is effected by the wages and conditions of employment of the workers who build them.

...
In submitting that it should have been treated as a federal undertaking for the purposes of its labour relations while it was doing construction work on the runways of Mirabel, *Montcalm* postulates that the decisive factor to be taken into consideration is the one work which it happened to be constructing at the relevant time rather than the nature of its business as a going concern. What is implied, in other words, is that the nature of a construction undertaking varies with the character of each construction project or construction site or that there are as many construction undertakings as there are construction projects or construction sites. The consequences of such a proposition are far reaching and, in my view, untenable: constitutional authority over the labour relations of the whole construction industry would vary with the character of each construction project. This would produce great confusion. For instance, a worker whose job it is to pour cement would from day to day be shifted from federal to provincial jurisdiction for the purposes of union membership, certification, collective agreement and wages, because he pours cement one day on a runway and the other on a provincial highway. I cannot be persuaded that the Constitution was meant to apply in such a disintegrating fashion.

To accept *Montcalm*'s submissions would be to disregard the elements of continuity which are to be found in construction undertakings and to focus on casual or temporary factors, contrary to the *Agence Maritime* and *Letter Carriers*' decisions. Building contractors and their employees frequently work successively or simultaneously on several projects which have little or nothing in common. They may be doing construction work on a runway, on a highway, on sidewalks, on a yard, for the public sector, federal or provincial, or for the private sector. One does not say of them that they are in the business of building runways because for a while they happen to be building a runway and that they enter into the business of building highways because they thereafter begin to do construction work on a section of a provincial turnpike. Their ordinary business is the business of building. What they build is accidental. And there is nothing specifically federal about their ordinary business.

Since the decision in *Montcalm* it is clear that only in the rarest exceptions would construction work fall outside of provincial jurisdiction.

13. In a similar factual situation in *Re Attorney General of Nova Scotia and Maritime Engineering Ltd. et al.*, (1980) 105 D.L.R. (3d) 158, the Appeal Division of the Nova Scotia Supreme Court held that an employer who was engaged exclusively in building and repairing wharves under a contract with the federal government on federal land came under provincial jurisdiction with respect to its employment relations with its employees. The Court held that Parliament has no jurisdiction over labour relations as such but that it might assert exclusive jurisdiction where it had exclusive or primary legislative competence and jurisdiction over labour relations as an integral part of that competence. The Court held that, while Parliament has exclusive legislative competence over navigation and shipping, where an independent contractor with its own employees was engaged in a work to further that head of jurisdiction, namely, the construction and repairing of wharves, the power to regulate its labour relations did not form an integral part of the federal juris-

dition over navigation and shipping. In that case the contractor worked exclusively for the federal government. The Court reasoned that a province had jurisdiction to certify a trade union for the contractors' employees. In the situation before this Board, the respondent does not even work exclusively as a contractor for the federal government.

14. The construction activity is an activity which is not essential to the operation of the Canal. See, for example, the remarks of Jackett, C.J. in *Re Canadian Airlines Employees' Association and Wardair Canada (1975) Ltd. et al.*, (1980) 97 D.L.R. (3d) 38, pp. 42-43. The work in question takes place when the Canal is not in operation. There is no jurisdiction in the federal government with federal legislation to cover the provincial labour relations aspect of the job on the Canal merely by asserting jurisdiction and applying certain federal legislation.

15. The Board has jurisdiction to entertain this application for certification and the Registrar is directed to list this matter for continuation of hearing. This panel is not seized with these applications.

0489-87-U Rodney Pickles, Raymond Miller, Albert Johnson, Andre Orosz, Giuseppe Grasso, Complainants v. United Brotherhood of Carpenters and Joiners of America, Local 785, Respondent

Duty of Fair Representation - Settlement - Unfair Labour Practice - Union and employer entering into minutes of settlement - Amount received by union credited to its general account - Failure to credit money to benefit accounts or failure to recover benefits on behalf of complainants not breach of fair representation duty

BEFORE: *Nimal V. Dissanayake*, Vice-Chair.

APPEARANCES: *T. J. Billo, Rod Pickles, Ray Miller and Bert Johnson* for the complainants; *J. J. Nyman, K. Ball and S. Koehler* for the respondent.

DECISION OF THE BOARD; May 13, 1988

1. This is a complaint under section 68 of the *Labour Relations Act*. The complaint relates to a settlement reached between the respondent, Galtcam Construction Inc. (hereinafter "Galtcam") and Thomas Construction (Galt) Limited (hereinafter "Thomas") in resolution of a number of proceedings filed before the Ontario Labour Relations Board. These minutes of settlement dated August 26, 1986, provided *inter alia*, that Galtcam will pay a total amount of \$21,069.06 to the union. The complainants contend that under the said minutes of settlement, the amount of \$8,072.49 was recovered and allocated as remittances on behalf of the five complainants' health and welfare and pension benefits under the collective agreement, and that having recovered these monies the union appropriated the same to the general fund of the local union. It is the complainants' position that the failure to credit this amount in favour of their benefit accounts constituted conduct that is arbitrary, discriminatory and in bad faith in contravention of section 68.

2. Alternatively, the complainants submit that, if no allocation of benefits was provided for in the minutes of settlement, the union acted contrary to section 68 by failing to do so. They

claim that the union's conduct was motivated by a desire to punish the complainants for accepting employment with Galtcam, which was a non-union company.

3. On behalf of the complainants, Mr. Rodney Pickles (who had filed the complaint on behalf of all the complainants) and Mr. William Meyer, Junior (President of Galtcam) testified. Mr. Karl Ball (Business Representative of the union) and Mr. Michael Church (a practicing labour lawyer) testified. Based on all of the evidence before me I make the following findings of fact.

4. The complainants were members of the union at all relevant times. The union had a collective bargaining relationship with Thomas from the mid-1960's and Thomas was bound by the Carpenters Provincial Collective agreement. Sometime in December, 1985 Mr. Ball became suspicious that Galtcam may be a related company to Thomas. Soon after, Mr. Pickles disclosed to Ball that Thomas was winding down its activities in February, 1986, and that a new company called Galtcam was starting up to operate on a non-union basis. Ball told Pickles that in his view Galtcam would be bound by the union's collective agreement. Ball made inquiries, and monitored the activities of Galtcam through January - February, 1986. He also instructed the union's lawyers to conduct corporate searches on Galtcam and on Thomas in order to ascertain any link between the two.

5. Sometime in January, 1986 Pickles inquired from Ball whether he had any positions as superintendent available. He stated that because of a bad knee he was unable to work with tools. Ball replied that he did not have such a position at that time. In February, Pickles informed Ball that since the union could not offer him a superintendent position, he had accepted employment as general superintendent with Galtcam, which he assured was a non-union company. At the time he did not indicate his terms of employment with Galtcam.

6. In February, 1986, Ball asked Pickles to sign a certificate of membership in order to apply for certification for Galtcam. Pickles flatly refused. Through those events both Pickles and Miller were elected officers of the union executive, Pickles as Conductor and Miller as Trustee. In March, Ball found out that all five complainants were employed with Galtcam.

7. In April the union filed section 1(4) and section 63 applications with the Board against Thomas and Galtcam. In addition a grievance was referred to the Board under section 124 of the Act. These proceedings were scheduled for hearing on May 29, 1986. In preparation for the hearing, on May 26th Ball met with four of the complainants, including Pickles and Miller. Ball concluded from their attitude that they were very content with their employment at Galtcam and wished that the union would refrain from taking any action against Galtcam. One of the complainants (it was not Pickles or Miller, but the evidence is not clear who disclosed) informed Ball that they had entered into individual employment contracts with Galtcam. Again the evidence is not clear if all five signed these contracts. There is evidence that at least Pickles and Miller did, but Ball testified that he thought all five did.

8. A copy of the contract dated March 5, 1986 signed by Pickles was filed in evidence. *Inter alia*, this contract provided for the following:

It provided for the same wage rate of \$17.05 per hour and 10 per cent vacation pay as provided by the Carpenters Provincial Collective Agreement. The vacation pay was to be paid directly to the employee. It expressly stipulated that benefits as per the collective agreement will not be paid.

Pickles was to be responsible for "all costs of fees including dues and benefits" if he wished to be a member of the union.

Pickles agreed "not to participate in anyway with the involvement of an organized labour faction to involve the employer directly".

If the employer was certified the employer will cease operations with no financial obligations to Pickles other than wages and vacation pay due.

Pickles' position was classified as a working general superintendent.

9. When Ball learned that Pickles and Miller, who at the time were members of the union executive, had signed these contracts he could not believe it and thought it was outrageous. Pickles in his testimony admitted that his signing of the contract in question was contrary to the union's interests and was also in violation of the union's constitution and the oaths he had taken as a union member and as a union officer. Pickles told Ball that he was not concerned about giving up his benefits because he had banked a substantial number of hours of benefits from which he could draw.

10. Under the union's constitution, Pickles and Miller could have been charged and the penalty could have included expulsion from union membership. Rather than take this drastic step, Ball gave them a choice of either facing charges or resigning from their union offices. They elected to resign, although in their letter of resignation they made it clear that they did not agree with the result. Since Pickles and Miller resigned, no charges were laid against them.

11. On May 29, 1986 the Ontario Labour Relations Board hearing commenced. Because the complainants showed some reluctance in assisting the union, three of them were issued summonses. They were present at the hearing but after hearing one witness the Board adjourned and recommended that the parties meet with a Labour Relations Officer. However, the Labour Relations Officer's attempts to settle the dispute was not successful. In the meantime, the union filed an application for certification, an unfair labour practice complaint and an application for consent to prosecute. In June, 1986 two further grievances were referred to the Board under section 124 with respect to two other projects the union claimed Galtcam was involved in. The Board scheduled all of the proceedings between the parties to be heard on August 26th and 27th, 1986. Thus by that time there were three section 124 grievances, applications under sections 1(4) and 63, an application for certification, an unfair labour practice complaint and an application for consent to prosecute pending before the Ontario Labour Relations Board.

12. At the time, Ball estimated that the total damages owing from Galtcam was in the neighbourhood of \$94,000. The prayer for relief in the section 124 referrals includes:

(1) "an order directing the payment of wages and benefits in accordance with the appropriate wage rates and benefits specified in the collective agreement to and on behalf of any member of Local 785 in your employ" and

(2) "an order directing the payment of damages to Local 785 on behalf of its out of work members".

13. On August 20, 1986, six days before the scheduled Ontario Labour Relations Board hearing, union counsel, Mr. Michael Church, met with the five complainants in preparation for the hearing. They attended the meeting arranged by Ball, but co-operated only reluctantly. Mr. Church testified that he had to "drag the information out". Church felt that the complainants were satisfied with their employment with Galtcam and were not anxious to see the union pursue the legal action. From their attitude Mr. Church concluded that they would at best be reluctant witnesses.

14. On August 22nd, settlement discussions commenced between Mr. Church (union coun-

sel) and Mr. Brian Mulroney (counsel for Galtcam). Mr. Mulroney felt that Mr. Ball's claim for \$94,000 in damages was outrageous. However, both counsel realized that if the matters proceeded to a hearing it would be very long and expensive and agreed that a settlement is preferable. There were two basic issues in dispute, one relating to bargaining rights of the union and the other the issue of damages.

15. The company was refusing to agree to a section 1(4) declaration because of its fear that unions representing other trades including the labourers may take advantage of such a declaration. The union and company counsel thus agreed to resolve the bargaining rights issue by entering into a voluntary recognition agreement retroactive to February, 1985 when Galtcam became active.

16. The damages issue was more difficult. The parties started with the company admitting no liability and the union claiming \$94,000. Finally, Mr. Mulroney suggested a payment of \$10,000. However, Mr. Ball would not settle for less than \$94,000. Mr. Church testified that Mr. Ball was being very difficult. While he was urging Mr. Mulroney to increase his offer, Mr. Church was also attempting to get Mr. Ball to lower his expectations. Finally, Ball came down to \$75,000, from there to \$60,000 and finally agreed that he will settle for \$25,000. Mr. Church testified that Mr. Mulroney was also interested in settling the matters and that he was looking for a means to justify a payment from Galtcam which would be acceptable to Mr. Ball. Since the company had already offered to pay \$10,000 in damages, Mr. Church pointed out to Mr. Mulroney that if Galtcam had paid benefits to the employees it would have cost approximately \$15,000 and that Mulroney should use that fact to convince his client that an additional payment of \$15,000 (which will bring the total to \$25,000) is appropriate. Mulroney got back to Church and informed him that his client's liability for benefits would have been only \$11,069.06 and not \$15,000. Mr. Church managed with difficulty to get Mr. Ball to agree to settle for \$21,069.06 by advising that it is not worth embarking on a lengthy hearing for the sake of a few thousand dollars.

17. Once the amount was agreed upon in principle, Mulroney inquired from Church if the union would agree to have the company pay the \$11,069.06 in benefits directly to the employees. Mr. Church testified that Mr. Ball not only refused, but that Mr. Mulroney's request almost upset the settlement. When the union refused, the company counsel inquired if the union would guarantee that at least some money will be directly credited to the employees' benefit accounts. Ball again refused. Mr. Church testified that he told Mr. Mulroney very specifically that the union wants the total amount of \$21,069.06 in damages and that Ball is not willing to make any allocations out of that amount. Mr. Church further told Mr. Mulroney that if the company so wished, it can pay the union the sum agreed upon and on top of that pay an additional amount on behalf of employees' benefits.

18. On the eve of the hearing date, agreement in principle was reached. Mr. Church prepared the minutes of settlement. Mulroney had indicated that the company could not pay the whole amount immediately. Thus Mr. Church decided to defer payment of \$10,000 to be payable in four instalments of \$2,500 each. The balance of \$11,069.06 was required to be paid immediately. \$11,069.06 was the amount company counsel had admitted as the amount owed by Galtcam representing unpaid benefits. The final minutes of settlement were executed at the Labour Relations Board on August 26, 1986, just prior to the scheduled hearing. The evidence is that Galtcam has complied with the terms of the minutes of settlement and that the total amount recovered by the union was credited to its general account.

19. The union readily concedes that during the settlement discussions the complainants were never consulted. The union's position is that it was the union's grievance, it had its carriage and it was free to settle it as it wished particularly since none of the complainants had requested

the filing of grievances or shown any interest in benefit payments until after the settlement was executed.

20. After the execution of the minutes of settlement on August 26, 1986, Pickles requested and received from Ball a copy of the minutes. There was no discussion about its content at that time. However, later that month, Pickles called Ball and inquired if benefits would be credited to employee accounts. Ball replied that there will not be any payments on behalf of employees and that all monies recovered were damages for Local 785. Subsequently in October, Pickles again brought the subject up with Ball and stated that the money would be credited to the employee benefit accounts. Ball discussed the situation with Pickles. He explained that no monies will be allocated to the employees' benefit plans and pointed out that the employees had signed away their benefits. However, Ball undertook to raise Pickles' concerns with the union's executive after the last payment from Galtcam is received on December 29, 1986, to see if the executive will recommend to the membership that the benefit accounts of employees be credited. At an executive meeting in November, 1986, Ball informed the executive of Pickles' request and of his undertaking to raise it after December. Ball testified that to his surprise a motion was made and seconded immediately that no money will be allocated to the employee benefit accounts. The executive was of the view that since the complainants had already signed individual contracts giving up any right to benefits; since they did not file grievances, and since they had refused to assist in certifying Galtcam, there was no way the union would allocate nearly half of the total money recovered, on behalf of the complainants' benefits.

21. Ball informed Pickles about the motion passed by the executive. Pickles requested a copy of the minutes of the executive meeting in question. Ball produced a copy and allowed him to read it, but informed him that if he wished to have a copy, he should request in writing. Pickles never did make a written request. Under the union's by-laws, a decision of the executive can be appealed to the general membership and from there to the General President of the International Union in Washington D.C. None of the complainants made use of these appeals. Pickles testified that it was useless to appeal because he did not know that an executive's decision has ever been overturned in appeal. Rather than pursue the appeal procedures, Pickles retained counsel and filed the present complaint on behalf of the five complainants.

22. Section 68 of the Act is as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

23. All of the evidence indicates that the union did not intend to allocate any part of the \$21,069.06 on behalf of employee benefits. On the face of the minutes of settlement there is no such allocation and paragraph 4 clearly states that "Galtcam agrees to pay damages to the union in the amount of \$21,069.06 in accordance with the following payment schedule". The only person who was directly involved in negotiating the settlement who testified was Mr. Church. His evidence is uncontradicted that the employer counsel raised the issue of allocating benefits and that Mr. Ball was very adamant in refusing that Mr. Church testified that he conveyed Mr. Ball's position categorically to Mr. Mulroney and suggested that the company may if it so wished pay employee benefits in addition to the \$21,069.06 payable to the union. In view of the clear evidence of Mr. Church and Mr. Ball, I reject the evidence of Mr. Myer Jr. that Mr. Ball assured him that he saw no problem in paying employee benefits out of the settlement amount.

24. The section 124 referrals indicate that the union did claim benefits as part of its prayer

for relief. It is also true that the amount of \$11,069.06 initially payable by Galtcam was based on Galtcam's liability for benefit payments. However, the evidence is uncontradicted that during settlement discussions, Galtcam's liability for benefit payments was simply used as a tool in convincing Galtcam to increase its offer of payment in damages. The evidence establishes that the union at no time intended to recover benefit payments on behalf of the complainants. The fact that the union did not request and did not receive remittance sheets setting out employees' work hours as is the practice when claiming benefits is a further indication that the money was not received as benefit payments on behalf of employees.

25. It follows therefore, that if the complaint is to be upheld I must find that the union acted in a manner that is arbitrary, discriminatory or in bad faith in executing minutes of settlement without recovering the benefits payments on behalf of the complainants. The complainants contend that the process of settlement adopted by the union was also arbitrary in that it signed off the complainants' right to benefit payments without any consultation with or notification to the complainants.

26. Other than Mr. Miller and Mr. Pickles, there is no evidence that any of the other complainants had shown any interest in their benefit payments at any time prior to the filing of the present complaint. Miller and Pickles for the first time showed an interest in recovering benefit payments after the settlement and been executed. They were aware that the benefits claim flows directly from the collective agreement and that their entitlement depends on Galtcam being bound by the collective agreement. Yet they were not willing to assist the trade union in its attempt to bind the employer to the collective agreement. They had entered into an individual "yellow-dog" type of contract agreeing "not to participate in anyway under the involvement of an organized labour faction to involve the employer directly". They indicated to the union by their conduct that they were quite content with their terms of employment with Galtcam which did not include benefits, and were content with Galtcam's promise to include benefits in the future if the company was profitable. They were both members of the union executive and therefore familiar with their rights under the collective agreement. Yet at no time did they file a grievance claiming benefits. Pickles testified that he did not file a grievance because he "assumed" that the union was seeking his benefits on his behalf. Counsel for the complainants suggested that the union had failed in its duty by not advising the complainants to file a grievance. I find that it was not reasonable for Mr. Pickles to have assumed that the union would be grieving to recover benefits on behalf of an employee who by his words and conduct had clearly indicated a total lack of interest in benefits. Mr. Pickles did not claim that Mr. Ball or any other union official said or did anything which caused him to make that assumption. In the circumstances, I also find that it was not unreasonable for the union not to have advised the complainants that they should file grievances.

27. The union and Galtcam were engaged in a series of complicated proceedings before the Ontario Labour Relations Board. The union believed it was owed \$94,000 in damages and Galtcam was admitting no liability for damages. The two counsel made a determined effort to avoid litigation which it was apparent would be lengthy and very expensive. With difficulty, they managed to convince their clients to settle. From the union's perspective, it did not get all that it felt was owing to it from Galtcam. Indeed, the ultimate amount recovered (\$21,069.06) represents approximately 1/5th of the original claim. The issue is whether the failure to recover benefits on behalf of the complainants was arbitrary, discriminatory or in bad faith within the meaning of section 68 of the Act.

28. To put at its highest, the complainants' claim amounts to this, that having initially claimed benefits on their behalf in the grievances, they waived them in the settlement without consultation with the complainants. In my view, in the absence of evidence that the union was moti-

vated by bad faith or discriminatory considerations, the mere fact that it waived a legitimate claim of an employee as part of a settlement of a broader dispute does not necessarily contravene section 68. The union was seeking to bind Galtcam to its collective agreement and was facing a complex series of legal proceedings. It accepted counsel's advice that a settlement is preferable to a long and expensive legal proceeding which may or may not end in its favour. It decided that what is more important is to establish its bargaining rights for the future. With much hesitation it decided to give up a substantial portion of its monetary claim for past violations, and it decided also not to pursue benefits on behalf of employees who had indicated a disinterest in those benefits by their conduct.

29. A trade union is entitled to take into account considerations beyond the immediate interests of an individual employee in deciding whether to settle a grievance, even if it is a grievance filed by the individual. It must be free to weigh the claim of the individual employee and the larger interest of the bargaining unit as a whole and its own institutional interests. (See, *Leonard Murphy*, [1977] OLRB Rep. Mar. 146). In the case at hand the union's conduct can be assessed in two ways. It may be said that the union gave up the five complainants' claim to \$8,072.49 in benefit payments in settling a complex series of legal proceedings. Or one may say that the union failed to pay the employees' claim out of the \$21,069.06 it recovered. Viewed either way, the union's conduct cannot be said to be arbitrary, discriminatory or in bad faith. Through its settlement, the union secured its bargaining rights and ensured that the employer will comply with the collective agreement in the future. In so doing, it gave up not only the employees' benefit claims but also approximately \$73,000 of its damage claim for past violations. While it did not recover all the money owing by the company as a result of its past violations, the settlement benefited the bargaining unit as a whole. Indeed, the evidence was that the complainants themselves benefited from the settlement in that from the effective date of the voluntary recognition the employer made benefit contributions on their behalf. In all of the circumstances, the union's conduct in executing the settlement does not constitute a violation of section 68. This is more so when considering the fact that the complainants had indicated no desire up to the time the settlement was reached that they had interest in receiving benefit payments and that the grievances were filed by the union on its own initiative.

30. The union recovered only a small proportion of its total monetary claim. Did it act unlawfully when all of the monies so recovered was credited to the union's general fund for the benefit of the bargaining unit as a whole? I think not. It is simply not reasonable to interpret the duty of fair representation as requiring the union to allocate nearly half of the total amount recovered on behalf of the five complainants who had showed no interest in securing their benefit payments and had expressly waived their rights to benefits in individual employment contracts.

31. Counsel for the complainants suggested that the union's failure to consult with the complainants during settlement discussions was indicative of bad faith. However, at the time there was no reason for the union to believe that the complainants were interested in their benefits. They had not made any such indication and on the contrary had conducted themselves in such a manner as would indicate that they are not concerned about benefits. They had not filed grievances and had shown no interest in subjecting Galtcam to the collective agreement. In these circumstances, the union did not act in bad faith when it settled the grievances that it had filed on its own initiative without seeking input from the complainants.

32. The evidence does not indicate any malice or bad faith on the part of Mr. Ball towards the complainants. Despite the fact that the complainants had clearly acted against the interest of the union, the union did not set out to persecute them. Thus, for instance, despite the fact that the complainants were employed illegally by Galtcam (without being referred by the hiring hall), in the

settlement the union recognized them as employees in the bargaining unit. Pickles and Miller could have been charged under the by-laws and possibly expelled from the union. This would have had the drastic result of effectively depriving the complainants of employment in the unionized sector. However, the union permitted them to resign from their union offices with no other penalty. There was no evidence of any hostile conduct or statements by union officials towards the complainants. There is no basis for concluding that a desire to punish the complainants for working non-union formed a consideration in the union's decision to enter into the minutes of settlement as it did. While the complainants' signing of "yellow-dog" type contracts and accepting non-union employment did influence the union's decision by indicating a disinterest in benefits, I am satisfied that there was no malicious motivation on the part of the union. In summary, it is my conclusion from all of the evidence that the union believed in good faith that it was advisable to settle the disputes and that the settlement it reached was in the best interest of the union and of the bargaining unit as a whole. In the circumstances there was no contravention of section 68 of the *Labour Relations Act*.

33. Accordingly, this complaint is hereby dismissed.

1590-87-G United Brotherhood of Carpenters' & Joiners of America, Local Union 27, Applicant v. R. Reusse Co. Ltd., Respondent

Abandonment - Bargaining Rights - Collective Agreement - Construction Industry Grievance - Whether respondent bound to Carpenters provincial agreement - Respondent operating openly without abiding by the term of the collective agreement - Union ought to have known the respondent was active - Union doing nothing for almost 15 years - Union found to have abandoned its bargaining rights prior to the advent of provincial collective bargaining - Complaint dismissed

BEFORE: S. A. Tacon, Vice-Chair, and Board Members J. A. Rundle and H. Peacock.

APPEARANCES: David McKee and Tony Bucci for the applicant; Peter J. Thorup, Karen Reynolds and Rob Reusse for the respondent.

DECISION OF THE BOARD; May 25, 1988

1. This is a referral of a grievance to arbitration in which the applicant asserts that the respondent is bound to the Carpenters' provincial collective agreement and, in violation of that agreement, assigned work to persons other than members of the applicant. The respondent denies being bound to the Carpenters' provincial agreement.

2. The Board heard testimony from four witnesses and a number of exhibits were tendered in evidence. In addition, the parties reached a partial agreement on facts. The Board has assessed the credibility of the witnesses according to the usual criteria and, having weighed and assessed that testimony in the context of the relative credibility of the witnesses, the documentary evidence and what is reasonably probable in the circumstances, makes the following findings of fact.

3. The respondent was incorporated in 1962 and has always been controlled by R. Reusse. For several years previously, Reusse had operated as a home improvement contractor. In that year, the respondent commenced acting as a general contractor, often having its own carpenters

and labourers and contracting out mechanical or electrical work. Over the years, the respondent has operated as a general contractor on numerous projects in the industrial, commercial and institutional (ICI) and residential sectors. A list of the projects was filed in evidence giving details as to sector, location, type of project etc. The Board is satisfied that significant carpentry work was involved in those projects. The Board is also satisfied that the respondent at all times carried out those activities openly by, for example, erecting conspicuous signage on the sites, bidding for projects and seeking sub-contractors through the relevant publications (e.g., The Daily Commercial News).

4. In 1965, the respondent commenced work on a public school construction project in Whitby (Fairman Public School). Reusse was approached by representatives of the United Brotherhood of Carpenters and Joiners of America, Local 397, and signed a Working Agreement with the Joint Building and Construction Trades Council of Oshawa, Port Hope, Cobourg and vicinity. In the following year, during construction of another school project (Fairport Beach Public School) in Pickering, Reusse was again approached by union representatives for the United Brotherhood of Carpenters and Joiners of America and entered into a Working Agreement with the Toronto Building and Construction Trades Council.

5. In the years since completion of those two projects, the Board is satisfied that the respondent continued to operate openly without abiding by the terms of the Working Agreements or collective agreement throughout the Toronto area, Local 397's jurisdiction and elsewhere in Ontario, including Sudbury, Barrie, Collingwood, Kapuskasing, Waterloo, in both the ICI and residential sectors. The projects range in size up to major developments such as LuCliffe Place on Bay Street in Toronto (1974 to 1976). The most recent project (and the one which prompted this grievance) is as an owner/builder of a nine-storey commercial office complex, the Parkway Corporate Centre, in Markham commenced in the spring of 1987 and scheduled for completion in approximately April 1988. Again, signage was conspicuously displayed on site, bidding and sub-contracting was openly conducted through the daily commercial news.

6. At no time in the over twenty-years from completion of the Fairport Beach Public School and Fairman Public School projects to date of the instance grievance was the respondent contacted by the union to negotiate renewals of the Working Agreements or collective agreement, nor were copies of renewal agreements forwarded to the respondent. It was not disputed that the respondent was never a member of any employers' organization for any labour relations or collective bargaining purposes and was not listed in the Ontario Labour Relations Board Carpenters' Accreditation Order (Board File No. 1322-71-R). In 1972, the United Brotherhood of Carpenters and Joiners of America filed a certification application for Board Area 11 in respect of a construction project of the respondent on a Senior Citizens Centre in Peterborough. The applicant subsequently sought to withdraw that application which was ultimately dismissed by the Board given the stage in the proceedings at which the request was made (Board File No. 2862-72-R, unreported decision, January 15, 1973). It should be noted that that application lists the respondent's address as Suite 215, 120 Eglinton Avenue East, Toronto.

7. Q. Begg, currently Business Manager for the Lake Ontario District Council which includes Local 397 (Oshawa), 1450 (Peterborough), 1071 (Cobourg) and 572 (Belleville), testified that records are kept of all companies with which the union has agreements. The District Council was formed in 1971, although the Belleville local joined in 1974. He further testified that the agreement signed by the respondent (Exhibit 2) was in the standard form negotiated with the local Builders Exchange in Oshawa. Renewal agreements, he stated, were first negotiated with the Oshawa Builders Exchange and then the union would approach non-members of the Exchange to sign that collective agreement. If a contractor was no longer working in the area, the approach would

be made on the firm's return. Begg also testified that, despite the wording of the agreements, the union did not consider those agreements as applicable to the residential sector but, rather, signed separate residential agreements with contractors building projects in that sector.

8. A letter dated March 16, 1971 over Reusse's signature was filed with the Board by the union. That letter gives notice of termination of the working agreement with the Toronto Building and Construction Trades Council dated May 20, 1966. Reusse identified his signature but testified that he had no recollection of signing the letter. Reusse also stated that he would have terminated the agreement with Local 397 had he thought his obligations under the 1965 working agreement continued past the Fairman Public School project. Reusse could not recall sending a similar termination letter to Local 397, just as he could not recall the May 20, 1966 document, but testified that the company records for that period had long since been destroyed, i.e., files were destroyed after ten years.

9. The Board next sets out the submissions of counsel in a highly abbreviated form. It should be noted that, in its factual findings, the Board has not dealt with the conversations between Reusse and the various union representatives at the Fairman Public School and Fairport Beach Public School sites which resulted in the signing of the Working Agreements and collective agreement. In the Board's view, the testimony of those conversations was understandably vague after the passage of over twenty years. Moreover, in this case, those imprecise recollections are outweighed by the probative value of the written documents, even if the Board were prepared to consider the assertion by respondent's counsel that, notwithstanding the express wording of the documents, the respondent was only bound for those two school projects. That is, the Board has proceeded on the basis that the respondent was bound to the agreements in respect of all construction in those geographic areas, as stated in the relevant scope clauses. Accordingly, the Board has not set out counsels' submissions dealing with the effect of those initial conversations.

10. Counsel for the applicant reviewed the evidence in support of his assertion that Local 397 had never abandoned its bargaining rights. Although counsel acknowledged that the bargaining rights created by virtue of the Working Agreement with the Toronto and District Building Trades Council had been terminated, he submitted that there had been no evidence of abandonment of Local 397's bargaining rights, and with the advent of province-wide bargaining, the respondent became bound to the applicant province-wide in 1978. Specifically, it was contended that, having not abandoned its rights prior to province-wide bargaining, Local 397 was incapable of abandoning those rights thereafter. Counsel argued the appropriate test for abandonment was not merely the passage of time or lack of contact with an employer who is no longer active in the geographical area but conduct or a knowing acquiescence in walking away from its rights. In this regard, counsel stressed that, following the Fairman Public School project, the respondent had completed only four projects in Local 397's area, namely, the Bowmanville Municipal Garage, the Newcastle Labour Building and two senior citizens housing projects. With respect to the latter housing projects, it was submitted that union practice was to negotiate separate residential agreements. As to the first two projects, counsel contended both were relatively small and not so notorious that the union "ought" to have known of their existence. With respect to the respondent's assertion that the lengthy delay amounted to a denial of natural justice, counsel submitted that there was no evidence to suggest the applicant had deliberately waited until 1987 to file the instant grievance so as to hamper the respondent's evidentiary case. Cases referred to in support include: *M. J. Guthrie Construction Limited*, [1984] OLRB Rep. Jan. 50; *J. S. Mechanical*, [1979] OLRB Rep. Feb. 110; *Able Construction (Kitchener)*, [1963] OLRB Rep. Sept. 317; *Inducon Construction (Northern) Inc.*, [1982] OLRB Rep. Mar. 390; *Culliton Brothers Limited*, [1982] OLRB Rep. Mar. 357; *John Miller & Sons Ltd.*, [1979] OLRB Rep. June 540; *Barkman Builders Ltd.*, [1984] OLRB Rep. Apr. 565; *City Plumbing (Kitchener) Limited*, [1985] OLRB Rep. Nov. 1566; *York-Finch*

General Hospital, [1987] OLRB Rep. Apr. 641; *Pinkerton's of Canada Limited*, [1986] OLRB Rep. June 818; *Vincent Spirito & Sons Ltd.*, [1986] OLRB Rep. Feb. 288; *Eagle Mountain Contracting Limited*, [1981] OLRB Rep. Apr. 442; *Losereit Sales and Services Ltd.*, [1983] OLRB Rep. Apr. 569; *291360 Ontario Limited c.o.b. as Lorne's Electric*, [1987] OLRB Rep. Nov. 1405; *Re Carpenters' District Council of Lake Ontario and Hugh Murray (1974) Ltd. et al., Re Labourers' International Union of North America, Local 527 et al. and John Entwistle Construction Ltd. et al.* (1980) 33 O.R. (2d) 670 (Ont. Div. Ct.).

11. Counsel for the respondent also reviewed the evidence but in support of his contention that the lengthy period of inactivity did amount to abandonment in the circumstances. In particular, counsel stressed the failure of Local 397 to seek to renew the collective agreement in over twenty years or to indicate to the respondent its practice of excluding the residential construction from the apparent scope of the working agreement. Moreover, it was argued that Local 397's conduct and the projects carried out in that area could not be considered in isolation from events in the Toronto area including the numerous projects carried out there by the respondent, the May 16, 1971 termination letter and the omission of the respondent from the 1972 accreditation order. The Board does not consider it necessary to set out counsel's alternative argument that, notwithstanding *Lorne's Electric*, *supra*, bargaining rights may be abandoned by an affiliated bargaining agent so as to bind the employee bargaining agent following the institution of province-wide bargaining, given its disposition of this application. Nor need the Board comment on representations by the respondent's counsel that the written reply submitted by counsel for the applicant (a procedure agreed to by the parties) fell outside the proper scope for reply. Finally, counsel stressed that the passage of time in filing the grievance, of itself, should lead to dismissal as the failure of Local 397 to pursue its bargaining rights has denied the respondent a fair opportunity to properly defend against the claim. In this assertion, counsel emphasized the fading recollections as to conversations over twenty years previously and the destruction of the respondent's records for the relevant period. Case cited include: *Clifford Masonry Limited*, [1981] OLRB Rep. Nov. 1561; *Hugh Murray Limited*, [1979] OLRB Rep. July 664; *John Entwistle Construction Limited*, [1979] OLRB Rep. Mar. 211; *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096; *The Belleville and District Builders' Exchange*, [1963] OLRB Rep. May 114; *Catalytic Enterprises Limited*, [1974] OLRB Rep. Apr. 264; *Cooksville Steel Limited*, [1974] OLRB Rep. June 365; *Mattagami Construction Company Limited*, [1965] OLRB Rep. Mar. 648; *Elgin Construction Co. Limited*, [1969] OLRB Rep. Apr. 134; *Ontario Precast Concrete Manufacturers' Association*, [1978] OLRB Rep. Mar. 284; *Valentine Enterprises Contracting v. The General Contractors' section of the Toronto Construction Association et al.* (1980), 80 CLLC ¶14,042 (Ont. Div. Ct.); *Re Carpenters' District Council of Lake Ontario and Hugh Murray (1974) Ltd. et al., Re Labourers' International Union of North America, Local 527 et al and John Entwistle Construction Ltd. et al.* (1980) 33 O.R. (2d) 670 (Ont. Div. Ct.).

12. The Board has reached a decision in this case on the basis that Local 397 had abandoned its bargaining rights prior to the advent of province-wide collective bargaining but that the working agreements signed in 1965 and 1966 were not restricted to the two projects in question. Thus, the Board need not deal with the arguments concerning misrepresentation or estoppel and the assertion by respondent's counsel that an affiliated bargaining agent could be found, by its conduct, to have abandoned bargaining rights following the introduction of province-wide collective bargaining and that such abandonment could bind the employee bargaining agency. The Board is not thereby implying any disagreement with the principles dealt with in such cases as *Lorne's Electric*, *supra*; *Culliton Brothers Limited*, *supra*; *Eagle Mountain Contracting Limited*, *supra*; *Losereit Sales and Services Ltd.*, *supra*; *Vincent Spirito & Sons Ltd.*, *supra*; *City Plumbing (Kitchener) Limited*, *supra*, just that those decisions are not relevant to the Board's disposition of the instant application.

13. It was not disputed that the question of abandonment is a matter of fact to be resolved by the Board in the circumstances of each case: *J. S. Mechanical, supra*; *Inducon Construction (Northern) Inc., supra*; *John Entwistle Construction Limited, supra*; *Re Carpenters' District Council of Lake Ontario and Hugh Murray (1974) et al, Re Labourers' International Union of North America, Local 527 et al.* and *John Entwistle Construction Ltd. et al., supra*; *Twin City Plumbing and Heating*, [1982] OLRB Rep. Apr. 631. In making that determination, the Board evaluates the conduct of the union in the context of the duration of the period of inactivity, whether the employer continued to operate in the area, whether the terms and conditions of employment have been changed by the employer without objection from the union, whether the union has sought to negotiate or administer existing collective agreements and any extenuating circumstances which might account for an apparent failure to assert bargaining rights. For example, as a general rule, the Board has regard to a second automatic renewal of a collective agreement but thereafter the onus is on the union to satisfy the Board that its bargaining rights have not been abandoned by showing its interest in maintaining those rights through contact with the employer party to the agreement: *The Belleville and District Builders' Exchange, supra*; *Cooksville Steel Limited, supra*; *Pinkerton's of Canada Limited, supra*. Absent evidence the union actively pursued its bargaining rights, the Board has held the union has "slept on those rights" and must be taken to have abandoned those rights: *Elgin Construction, supra*; *Mattagami Construction, supra*; *Catalytic Enterprises, supra*; *John Entwistle Construction Limited, supra*; *York Finch General Hospital, supra*. The Board's jurisprudence also accepts the notion that a union is not expected to seek actively to pursue its bargaining rights during periods when the employer ceased operating within the geographic scope of the collective agreement (see *Able Construction (Kitchener), supra*; *Inducon Construction (Northern) Inc., supra*) particularly where the union did seek to assert those rights at the first opportunity upon the employer's return to the area: *John Miller & Sons Ltd., supra*.

14. The Board must next evaluate the facts of the instant case in the context of the above noted principles. Counsel for the union asserts that only two projects (the Bowmanville Municipal Garage and the Newcastle Lumber Building) should "count" against Local 397; he disregards the senior citizens apartments projects in Whitby and Oshawa as "residential". Thus, he asserts, the union could not have known of the employer's activity in the relevant geographic jurisdiction and, therefore, could not be said to have abandoned its bargaining rights prior to the institution of province-wide bargaining. The Board disagrees.

15. What is most striking about this application is that, having attained bargaining rights in 1965, Local 397 did *nothing* for almost 15 years (just to the advent of province-wide bargaining) to negotiate renewals of the collective agreement, administer those "existing" agreements or otherwise contact the respondent. Given such an extended passage of time, the Board must carefully scrutinize the reasons proffered by the union as explanation for its inactivity in order to avoid the reasonable inference that the union has abandoned its bargaining rights. Even at its narrowest, the Board is not satisfied that the union exercised due diligence in respect of the Bowmanville Municipal Garage and the Newcastle Lumber Building Projects. Both sites involve significant carpentry work. The Bowmanville project was readily visible from the highway and followed closely upon the Fairman Public School Project. When Local 397's conduct is considered in the other circumstances, the only reasonable conclusion is that the union ought to have known the employer was active (*Clifford Masonry Limited, supra*; *Twin City Plumbing, supra*; cf. *Barkman Builders Ltd., supra*). For example, while the union indicated that it regarded "residential" construction as outside the apparent scope of its collective agreement with the respondent, at no time was that ever communicated to the company nor did the local approach Reusse to request he sign such residential agreements in respect of the senior citizen's complexes he built in Whitby and Oshawa. That is, at the very least, those apartment complexes were a clear indication the respondent was continuing to operate in the area yet Local 397 did not contact Reusse to negotiate renewals of the first collec-

tive agreement. As noted earlier, it was the Local's practice where, as here, the company was not a member of the local builder's exchange, to first negotiate an agreement with the exchange and then contact the other firms for which it held bargaining rights to obtain their signatures. The local did not contact the respondent to obtain such renewals. This is not an instance where the respondent moved its operations outside the scope of its bargaining commitments. Rather, the respondent openly continued operating in Local 397's geographic jurisdiction and the surrounding areas as well as elsewhere in the province.

16. In addition, it must be emphasized that the respondent's operations had attracted the attention of the other locals of the union. Bargaining rights were obtained for the Toronto area in 1966 with the building of the Fairport Beach Public School project but, despite extensive construction activity thereafter, including several sizeable projects in 1970's, the Toronto Building and Construction Trades Council, as well, failed thereafter to contact Reusse. The applicant acknowledges that the Toronto area bargaining rights were extinguished given the notice of termination letter of May 16, 1971, without any response by the union and that the respondent was omitted from the Board's accreditation order in 1972. Moreover, in 1972, a certification application by the United Brotherhood of Carpenters and Joiners of America in respect of Board Area 11 (Peterborough) was dismissed. In short, this was a firm which carried on its construction activities openly throughout the geographic jurisdiction of Local 397 and the surrounding areas through extensive signage, publication of its successful bids and tendering for sub-contractors through the relevant commercial publications and such like. Indeed, as exhibit 4 outlines, the respondent had been involved in roughly 39 construction projects by the late 1970's.

17. The Board does not consider the absence of a letter to Local 397 terminating the collective agreement, like that sent to the Toronto Building and Construction Trades Council, as helpful to the applicant's case. In this regard, the Board notes the respondent's testimony that its records were routinely destroyed after a period of ten years. The Board is not prepared to infer from the failure of Local 397 to find such a letter in its records that a letter never existed or, more to the point, that the absence of such a document assists local 397 in satisfying the Board that it has not "slept on its bargaining rights" over the years.

18. Thus, the Board finds, on the totality of the evidence, that Local 397's voluntarily abandoned its bargaining rights prior to the introduction of province-wide bargaining. Consequently, the respondent was not brought within the ambit of that province-wide collective bargaining scheme so as to sustain this application by Local 27 of the United Brotherhood of Carpenters and Joiners of America in respect of the construction project which is the subject of the instant grievance.

19. For the foregoing reasons, then, this application is dismissed.

2300-87-R International Brotherhood of Painters and Allied Trades - Local 1824, Applicant v. Sirfran Construction Managers Inc., Respondent

Certification - Construction Industry - Employer - Full-time employees of the company to whom the respondent had sub-contracted work performing work for the respondent on the application date - Employees working contrary to moonlighting provision in collective agreement - Employees properly falling within bargaining unit - Certificates issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. Gibson* and *H. Kobryn*.

APPEARANCES: *Elizabeth Mitchell* and *George McMeney* for the applicant; *Thomas Pynn* and *Michael S. Ruddy* for the respondent.

DECISION OF THE BOARD; May 9, 1988

1. The name of the respondent is amended to: "Sirfran Construction Managers Inc."
2. The applicant is a trade union within meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to a designation issued by the Minister under section 139(1)(a) of the Act on April 4, 1978, the designated employee bargaining agency is the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and allied Trades.
3. This is an application for certification within the meaning of section 119 of the Act and is an application made pursuant to section 144(1) which provides that:

144.-1(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

4. Having regard to the agreement of the parties and pursuant to section 144(1) of the Act, the Board finds that all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all glaziers and glaziers' apprentices in the employ of the respondent in all sectors of the construction industry, other than the industrial, commercial and institutional sector, in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The respondent filed a reply and a list of employees in the bargaining unit which has no names on it. At the hearing of the application, the parties agreed that Ted Niescier should be on

the list of employees. The applicant submitted that Tom Brombacher, Warren Donald and Gerald Miller were also employees in the bargaining unit on the day the application was made. The respondent argued that those three men were employees of another company, Waterloo Glass, during the material times, or, in the alternative, that Miller was an independent contractor who employed Brombacher and Donald. In the further alternative, the respondent argued that the three persons in dispute were "moonlighting" contrary to Article XIV of the applicant's provincial agreement under which they worked for Waterloo Glass and that, accordingly, it would be inequitable to permit this application to succeed.

6. The respondent contracted with Waterloo Glass to do some glazing work at the Alexanian Carpets job site in Cambridge. Miller spent part of each of two separate days doing glazing work at the site, prior to November 14, 1987, as an employee of Waterloo Glass. Brombacher accompanied him on one day and Donald accompanied him on the other.

7. Miller testified that he is a journeymen glazier who has been employed by Waterloo Glass for approximately three years. Brombacher is a journeyman glazier metal mechanic. He has been employed by Waterloo Glass for approximately four years. Donald is a glazier apprentice who was employed by Waterloo Glass for approximately 6 months at the time the application was made. All three worked the entire week before and the entire week after the date of application for Waterloo Glass. Waterloo Glass and the applicant are bound to a collective agreement between the Architectural Glass and Metal Contractors Association and the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades. Article XIV of that collective agreement provides that:

ARTICLE XIV - PIECE WORK AND MOONLIGHTING

- 14.01 All members of the Union expressly agree not to accept employment or subcontracts from any individual firms, co-partnership or corporation unless signature to this Agreement.
- 14.02 No member of the Union shall work on a piece work basis.
- 14.03 The employer shall not sub-contract work normally performed by itself under this agreement except to a contractor signatory to this agreement. However, in special cases, alternate arrangements will be made between the employer and the local business agent.

8. Sometime during the second day that Miller was at the Alexanian job site, J. P. Gravel, the respondent's superintendent, asked him if he was interested in fabricating and installing a wall curtain. Miller indicated that he was and it was agreed that he would be paid \$18.00 per hour and that Donald, who would work as his helper, would be paid \$10.00 an hour. Because Gravel did not know when the necessary materials would arrive, the date that the work was to be done was left unspecified except to the extent that it was agreed that it had to be done on a Saturday because of Miller's (and Donald's) employment obligations to Waterloo Glass from Monday through Friday of each week.

9. On Friday, November 13, 1987, Gravel telephoned Miller to advise him that the materials had arrived and that he should come in to install the wall curtain the following day, Saturday, November 14, 1987. Miller decided that he really should not do the work for health reasons. Consequently, he telephone Brombacher and asked him to substitute for himself. Brombacher agreed.

10. Although he had no intention of staying, Miller reported to the job site at 8:00 a.m. on November 14, 1987 as arranged with Gravel because he had agreed to do so. He arrived in a Waterloo Glass truck which he had borrowed the previous evening. Brombacher and Donald also

arrived, each in his own vehicle. Miller told Gravel that he could not stay because he had a service call to do for Waterloo Glass (which was not true) but that he had brought Brombacher as a substitute for himself. Gravel assented to this.

11. Notwithstanding that he did not intend to stay, Miller fabricated the wall curtain with Brombacher. During the approximately one and a half hours it took them to do so, Donald was engaged in installing glass which was part of Waterloo Glass' contract with the respondent. Brombacher subsequently spent approximately ten minutes checking that work.

12. Having completed the fabrication, Miller, Donald and Brombacher, with the assistance of Gravel, another of the respondent's employees (presumably Niescier), and three employees of the landscaping contractor on the site at the time, raised the wall curtain in order to begin affixing it to the building. In the process, a 2 x 4 fell and struck Miller and he left the site shortly thereafter.

13. Brombacher and Donald completed the erection using Brombacher's tools and screws that Brombacher and Miller had brought to the site, some of which screws had been supplied to them by Waterloo Glass. This took between five and five and a half hours. When they finished, Brombacher pointed out some cosmetic shortcomings in the material which had been supplied to the respondent. In addition, Gravel gave him a personal cheque for the entire amount due Miller, Donald, and himself, which amount included payment for the Waterloo Glass work the latter two had done. Brombacher testified that, at Gravel's request, he wrote out a receipt stating that he had "received so much money for doing work for Sirfran Construction".

14. Miller and Brombacher both testified that they thought they were employed by the respondent on November 14, 1987. Donald did not testify.

15. After learning that he was to install the wall curtain for the respondent on November 14, 1987, Miller telephoned George McMenemy, a business agent for by the applicant, to advise him that he was going to do so. He testified that McMenemy told him to go ahead.

16. While it may be true that no one can be employed by more than one employer at any one instant in time, there is nothing to preclude an individual from being employed by more than one employer in the course of the same week, or even during the same day. Indeed, in Ontario, it is not uncommon for individuals to have several part-time jobs, or a full-time job and a part-time job, which may result in them being employed by more than one employer on the same day from time to time. Because of the often transient nature of employment in the construction industry, it has long been the Board's practice to require that individuals be at work for the respondent employer on the day the application is made in order to be counted as employees in the bargaining unit for purposes of the Board's consideration of the application (see for example, *Smiths Construction Company Arnprior Limited*, [1984] OLRB Rep. March 521). However, there is no requirement that such individuals be so engaged on any day other than the date of application. In this case, the respondent does not dispute that Miller, Brombacher, and Donald were present on the job site and engaged in work of which the respondent was the beneficiary on the date of application. However, it asserts that none of them were employees of the respondent on that day.

17. In determining whether or not an individual is an employee and, if so, by whom s/he was employed during the material times, the Board has concentrated on the substance rather than the form of the relationship, especially since 1975, when the Legislature enacted section 1(1)(h) and (i) of the *Labour Relations Act* to include dependent contractors as employees for purposes of the Act. In determining whether an individual is an employee or an independent contractor for labour relations purposes, the Board has applied the fourfold test set out in *Montreal v. Montreal Locomotive Works et al* [1947] 1 D.L.R. 161 in the context of the overall organization of the work

in question (the organization test being one applied in *Meyer v. J. P. Conrad Lavigne Ltd.* (1980) 27 O.R. (2d) 129 (Ont. C.A.); and see also *Brantwood Manor Nursing Homes Limited* [1986] OLRB Rep. Jan. 9; *Babco Plumbing Services Ltd.* [1985] OLRB Rep. Dec. 1693; *K-Mart Canada Ltd.* [1983] OLRB Rep. May 649 among others) and also having regard to the purpose of the *Labour Relations Act*. Ultimately, the question becomes whether an individual's economic position is more like that of an employee than like that of a self-employed entrepreneur, when viewed from the collective bargaining perspective and the mischief which the Act is designed to remedy (see *McDonald-Ronald Limousine Service Limited, operating as Airline Limousine*, [1988] OLRB Rep. March 225; *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. Apr. 197; *Nelson Crushed Stone*, [1977] OLRB Rep. Feb. 104).

18. Glaziers commonly own the tools they use. Consequently the fact that Miller and Brombacher owned the tools that were used to do the installation of the wall curtain does not mean that they were not employees of the respondent on November 14, 1987. The fact that they, and Donald, performed work directly for the respondent for only one day and were otherwise regularly employed by Waterloo Glass does not, given the nature of employment in the construction industry, mean they were not employees of the respondent on that one day.

19. Employers in the construction industry, when using employees who are union members, will commonly select the number of employees they require but not which ones they are to be. Instead, some or all of the employees will be designated by the union in accordance with the hiring hall procedures established for that purpose. Further, an entity may, for labour relations purposes, be the employer notwithstanding that it was not the actual hirer (see *Sentry Department Stores Limited (operating under the name G.E.M. Stores* (1965), [1968] OLRB Rep. Sept. 540; *Alwell Forming Limited*, [1978] OLRB Rep. Aug. 709; *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538). Nor does the fact that an entity did not intend to enter into an employment relationship mean it is not the employer (for labour relations purposes) where it keeps its intentions (or lack thereof) to itself (see *Sentry Department Stores Limited, supra*; *Welland County Roman catholic Separate School Board*, [1972] OLRB Rep. Oct. 884; *Ralston-Purina Canada Inc.*, [1979] OLRB Rep. June 552). In this case, the respondent, acting through its superintendent Gravel, selected Miller and agreed that he and a helper (Donald) who was suggested by Miller and accepted by Gravel, would fabricate and erect the wall curtain. When Miller decided that he did not want to do the work after all, he selected Brombacher to take his place. He discussed this with Gravel upon arriving at the job site on November 14, 1987 and by his conduct, Gravel, on behalf of the respondent, assented both to that and to all three men working on the wall curtain. In the circumstances, we are satisfied that the respondent played a significant role in the hiring of Miller, Brombacher and Donald and that it retained an overall power to direct what they did on November 14, 1988.

20. Further, the respondent supplied all of the materials for the fabrication of the wall curtain. We attach no significance to the fact that Brombacher and Donald used screws belonging to either Brombacher, Miller, or Waterloo Glass to actually affix the wall curtain to the building. Further, it had been agreed that those working on the wall curtain would be paid at an hourly rate regardless of the amount of time they spent on it and it appears that Miller, Brombacher and Donald were all so paid. Accordingly, the chance of profit or risk of loss lay entirely with the respondent. Finally, although Donald did not testify, Miller and Brombacher assumed they were employees of the respondent on November 14, 1987, and there is no cogent evidence before the Board which suggests either that the respondent gave them any indication that they were not, or that it was unreasonable for them to make that assumption.

21. In the result, having regard to the circumstances and the purpose of the *Labour Relations Act*, we find that Miller, Brombacher and Donald all were employees in the bargaining unit

on the day this application was made. Accordingly, there were four persons in the bargaining unit on the date of application.

22. The respondent's final argument was that it would be inequitable to allow the applicant to benefit from finding that Miller, Brombacher, and Donald were employees on the date of application. It is clear that in working for the respondent on that day, they did breach Article XIV of the collective agreement which governed their full-time employment with Waterloo Glass. It is also evident that the applicant was aware of and even encouraged that breach. Assuming, without finding, that an administrative tribunal such as the Board, which is entirely a creature of statute, has the jurisdiction to apply equitable principles, and assuming that it would be appropriate to consider such principles in determining who was employed in a bargaining unit at the relevant times, we observe that it is a well established principle that he who seeks equity must do equity. The respondent is, in law, a stranger to the applicant's provincial agreement and there is no evidence to suggest that the respondent was aware of the existence of Article XIV of the applicant's provincial agreement until after November 14, 1987. However, it was clearly aware that Miller, Brombacher and Donald were full-time employees of a company to which it had sub-contracted work. In addition, although the evidence does not establish that the installation of the wall curtain was part of the work that had been sub-contracted to Waterloo Glass, Donald and Brombacher both spent some time on November 14, 1987 installing windows which was a part of that work, and the evidence suggests that Brombacher and Donald were paid for that work by the respondent and that Waterloo Glass was not. Accordingly, even if we were satisfied that the conduct of the applicant and of Miller, Brombacher and Donald was such that it would be inequitable, we are satisfied that the respondent's own "hands" are not "clean" and it is therefore not entitled to any equitable relief.

23. The applicant filed documentary evidence of membership, in the form of three Certificates of Membership in support of the application. The certificates are signed by the member to whom they refer and indicate that each paid monthly dues of \$12.50 for at least one month within the six-month period immediately preceding the terminal date for the application. The certificates have been checked and certified correct by an officer of the applicant. The applicant also filed the requisite Form 80, Declaration Concerning Membership Documents, Construction Industry, attesting to the regularity and sufficiency of its membership evidence. We are satisfied that the membership evidence meets the requirements of the Act.

24. In the result, the Board is satisfied, on the basis of all the evidence before it, that more than fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 3, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

25. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the

employee bargaining agency named in paragraph 2 above in respect of all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

26. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all glaziers and glaziers' apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

2878-87-R Ontario Secondary School Teachers' Federation, Applicant v. The Board of Education for the City of Toronto, Respondent v. Ontario Public Service Employees Union, Intervener

Practice and Procedure - Pre-Hearing Vote - Employee expressing concern about the procedure involved in segregating ballots - Board explaining purpose of sealing ballot box and segregating ballots - New vote not warranted

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *D. A. MacDonald* and *B. L. Armstrong*.

DECISION OF THE BOARD; May 26, 1988

1. In a decision dated March 30, 1988, the Board directed the taking of a pre-hearing representation vote in this matter. A large number of persons are the subject of dispute and since the applicant may or may not enjoy the support of thirty-five per cent of the employees of the respondent in the voting constituency, the ballot box was sealed. As is customary, the Board directed that if any of the disputed individuals attended to vote, he or she was to be allowed to vote and his or her ballot segregated. The parties are to address the status of the disputed individuals at a hearing scheduled for after the vote.

2. The vote was held on April 19, 1988 and the day fixed for making representations on a variety of matters, including the conduct of the vote, was April 29, 1988. On April 28, 1988, the Board received a letter from one of the employees in dispute, Mr. Richard Hooker, expressing concern about the vote procedure and in particular, about the procedure involved in segregating ballots. We are satisfied that Mr. Hooker's letter constitutes a timely statement of desire to make representations in a matter relating to the representation vote, pursuant to Form 72 "Notice of Report of Returning Officer Where Board has Directed that Ballot Box be Sealed" and subsection 70(2) of the Board's Rules of Procedure. Mr. Hooker does not request a hearing. Accordingly, we are dealing with Mr. Hooker's statement without a hearing or further notice to the parties or employees.

3. Mr. Hooker's concerns are as follows: he cannot reconcile the instructions on the "Notice of Taking of Vote" not to mark his ballot in a manner that would reveal his identity with the fact that his number on the voters list also appeared on the brown envelope containing the white envelope into which his ballot had been placed; he believes there may be serious results for the

livelihood of persons whose ballots are segregated of a ballot's not being kept secret; he cannot understand why he was on the voters list when his eligibility to vote was challenged and why he was not informed of the challenge before he voted; he does not know who challenged his eligibility or when or why it was challenged; he wonders why the disputes could not have been resolved prior to the vote; and he asks whether the Board intends to accept the results of the vote "as final".

4. This application was made under section 9 of the Act, the pre-hearing representation vote provisions. Those provisions envision a two-stage procedure: in the first stage, under subsection 9(2), the Board determines a voting constituency and where there is the requisite appearance of support, may (and usually does) direct the taking of a pre-hearing representation vote among the employees in the voting constituency. The Board does not determine matters in dispute at this stage in order to satisfy the underlying purpose of these provisions: a speedy vote. If the issues in dispute are such that their resolution could result in the Board's dismissing the application, the Board directs that the ballot box be sealed. That direction will be given, for example, where the applicant has not previously been found to be a trade union within the meaning of clause 1(1)(p) of the Act, where the Board's jurisdiction to hear the application is challenged or where there is a contention that the application is untimely, among other circumstances. The Board directs that the ballot box be sealed because it does not want to reveal the results of a vote where the application may be dismissed even though the applicant was successful in vote, in other words, for a reason unrelated to the outcome of the vote.

5. The ballot box is also sealed where the eventual determination of the bargaining unit may mean that the applicant did not enjoy the support of thirty-five per cent of the employees in that unit at the time the application was made. In this case, the parties have agreed on the *description* of the bargaining unit, but not on the *composition*: as stated above, there are a large number of persons whose inclusion in the bargaining unit is in dispute. Depending on how many of these persons are eventually included in the unit, the union may or may not satisfy the precondition for counting the pre-hearing representation vote. The vote will be counted if the Board is satisfied that "not less than 35 per cent of the employees in [the] bargaining unit were members of the trade union at the time the application was made", pursuant to subsection 9(4) of the Act. If the Board is not so satisfied, the vote will not be counted and the application dismissed.

6. The voting constituency is designed to include all persons (or categories of employees) who might be included in the bargaining unit the Board ultimately finds to be appropriate: that is, in order to ensure an appropriate bargaining unit can be created from the voting constituency. Therefore, all persons who might be in the bargaining unit are entitled to vote. Where individuals (or categories of employees) are in dispute, they are allowed to vote despite the fact that their inclusion in the bargaining unit is being challenged because the Board may decide they are to be included in the unit; on the other hand, the Board may find they are not to be included in the unit. By segregating the ballots of persons in dispute, either outcome can be easily accommodated: if the person is included in the unit, his or her ballot will be counted, but if he or she is not included, his or her ballot will not be counted. Because this is a pre-hearing vote, there is no alternative since the vote, under the scheme of the Act, occurs prior to the Board's determination of the status of the persons in dispute.

7. The actual ballot marked by any voter, including one in dispute, contains no marks identifying the voter. Where a ballot is to be segregated, it is placed in a white envelope which also contains no identifying marks. The white envelope is in turn placed in a brown envelope which does indicate whose ballot is inside the white envelope inside the brown envelope. A brief moment's thought will indicate why that identification is necessary. Suppose that voters A, B and C are in dispute and their ballots have been segregated. The Board determines that A and B

should be included in the unit, but that C should not be. The ballots of A and B will be counted; C's ballot will not be counted (but will be destroyed). Without some identifying mark on the brown envelope, there would be no way of knowing which ballots to count. We know which brown envelopes contain A's ballot and B's ballot, however. When the Returning Officer counts the segregated ballots, he or she will remove the white envelopes from the brown envelopes, remove the ballots from the white envelopes and mix them up so that no one, including the Officer, knows which ballot came out of which white envelope or which white envelope came out of which brown envelope. Only then will the Officer see how the ballots are marked. No one knows which ballot was marked by A and which by B. Indeed, the Board is so concerned about protecting the secrecy of the ballot that where a single segregated ballot will determine the outcome of a vote, the Board will order a new vote rather than count the ballot and reveal the preference of the employee. (See *The Board of Education for the City of Toronto*, [1983] OLRB Rep. July 1229, para. 6 and *Bayly Engineering Limited*, [1979] OLRB Rep. June 471, para. 6 for a description of the segregated vote process.)

8. The names of the persons in dispute, and the reason for the challenge, were included in appendices to the Board's decision directing the vote. The names were underlined on the voters list.

9. On the basis of the above description of the Board's procedure, it is evident that the secrecy of the ballot is maintained where ballots are segregated, even though of necessity it must be possible to distinguish segregated ballots which are to be counted and those which are not. The danger to which Mr. Hooker averts with respect to the livelihood of persons whose ballots are segregated thus does not arise. His name was included in the list of eligible voters so that should he be found to be in the bargaining unit, he would have had an opportunity to vote. As the decision of March 30, 1988 indicates, Mr. Hooker was one of many persons (approximately one hundred) whose inclusion in the bargaining unit was disputed. In Mr. Hooker's case, Appendix A to the March 30th decision indicates that he is being challenged as having temporarily withdrawn from the respondent's secondary panel. His status and that of the other disputed persons will be resolved at a hearing scheduled for after the vote which notice will be given and persons wishing to make submissions on that issue may do so. That is the nature of the pre-hearing vote process vote first and resolution of disputes following.

10. We note that even if we determine that Mr. Hooker is included in the unit, it will not be possible to count his ballot since he chose to tear it up when he was not satisfied with the Officer's explanation of the segregated ballot.

11. As for whether the Board accepts the outcome of the vote as final, the disposition of this application awaits the hearing into the status of the disputed individuals. However, nothing in Mr. Hooker's statement warrants our directing another vote in this matter.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1988

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1391-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Del Equipment Ltd., Del Hydraulics Ltd., Edinburgh Electric Ltd. (Respondents)

Unit: "all employees of the respondents in the Municipality of Metropolitan Toronto, save and except foremen and persons above the rank of foreman, office and sales staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (196 employees in unit)

1648-87-R: Millwright District Council of Ontario, United Brotherhood of Carpenters & Joiners of America, on behalf of Locals 1007; 1151; 1244; 1410; 1425; 1592; 1916; and 2309 (Applicant) v. Walters Welding & Ironworkers Ltd. (Respondent) v. International Association of Bridge, Structural & Ornamental Iron Workers, Local 736 (Intervener)

Unit: "all millwrights and millwrights' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all millwrights and millwrights' apprentices in the employ of the respondent in all other sectors in the regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2299-87-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Engineered Electric Controls Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2359-87-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. 99538 Canada Inc., c.o.b. as B.C. Meck (Respondent) v. René Piché on his own behalf and on behalf of a group of employees of B.C. Meck (Intervener)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

2394-87-R: Labourers' International Union of North America, Local 1059 (Applicant) v. O. S. Concrete Forming Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

2463-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bezac Developments Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit)

2595-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Fish General Contractors Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria and the County of Grey, save and except non-working foremen and persons above the rank of non-working foreman" (41 employees in unit) *(Having regard to the agreement of the parties)*

2954-87-R: Canadian Union of Restaurant & Related Employees, Hotel Employees & Restaurant Employees Union, Local 88 (Applicant) v. Cara Operations Ltd. (Respondent)

Unit #1: "all waitresses, waiters, buspersons, kitchen staff, cashiers and bartenders employed by the respondent at its Swiss Chalet Restaurant located at 151 Front Street West in the Municipality of Metropolitan Toronto, save and except assistant hostesses, persons above the rank of assistant hostess, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (27 employees in unit) *(Having regard to the agreement of the parties)*

Unit #2: "all waitresses, waiters, buspersons, kitchen staff, cashiers and bartenders employed by the respondent in its Swiss Chalet Restaurant located at 151 Front Street West in the Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant hostesses, and persons above the rank of assistant hostess" (10 employees in unit) *(Having regard to the agreement of the parties)*

2957-87-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Flexmaster Canada Ltd. (Respondent)

Unit #1: "all employees of the respondent in the City of Ottawa, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit) *(Having regard to the agreement of the parties)*

Unit #2: (see *Applications for Certification Dismissed Without Vote*)

2977-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Qualified Masons Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in all sectors of the construction industry in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen, persons above that rank, and persons employed in the industrial, commercial and institutional sector of the construction industry" (9 employees in unit) (*Having regard to the agreement of the parties*)

3065-87-R: Canadian Union of Public Employees (Applicant) v. St. Joseph's Villa (Respondent)

Unit: "all lay employees of St. Joseph's Villa at 56 Governor's Road, Dundas, Ontario, regularly employed for not more than 24 hours per week, save and except professional and medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, supervisors, persons above the rank of supervisor, technical personnel, and office staff" (95 employees in unit) (*Having regard to the agreement of the parties*)

3084-87-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. General Motors of Canada Ltd., Scarborough Plant (Respondent)

Unit: "all security guards employed by the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except sergeants, persons above the rank of sergeant, office and clerical staff" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3102-87-R: United Steelworkers of America (Applicant) v. Sarnia Occupational Safety & Health Information Centre (Respondent)

Unit: "all employees of the respondent in the City of Sarnia, save and except Board Members, persons above the rank of Board Member and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*)

3120-87-R: Canadian Union of Public Employees (Applicant) v. Canadian Council for International Cooperation (Respondent)

Unit #1: "all employees of the respondent in the City of Ottawa, save and except Executive Director, persons above the rank of Executive Director, the Administrative Officer, the Executive Assistant, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (13 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the City of Ottawa regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except the Executive Director, persons above the rank of Executive Director, the Administrative Officer, and the Executive Assistant" (3 employees in unit) (*Having regard to the agreement of the parties*)

3122-87-R: Canadian Union of Public Employees (Applicant) v. The Art Gallery of Windsor (Respondent)

Unit: "all employees of the Art Gallery of Windsor at Windsor, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except the Director, the Curators, Secretary to the Director and employees in bargaining units for which any trade union held bargaining rights as of February 16, 1988" (3 employees in unit) (*Having regard to the agreement of the parties*)

3132-87-R: Ontario Nurses Association (Applicant) v. Ongwanada Hospital (Respondent)

Unit: "all registered and graduate nurses employed by the respondent in a nursing capacity at its Hopkins Division in Kingston, save and except head nurses, persons above the rank of head nurse and persons regularly employed for not more than 24 hours per week" (8 employees in unit) (*Having regard to the agreement of the parties*)

3138-87-R: United Brotherhood of Carpenters' & Joiners of America Local Union 27 (Applicant) v. All Trades Estimating Limited (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in its Landmark Construction Division in the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3155-87-R: Service Employees International Union, Local 204 affiliated with S.E.I.U., AFL:CIO:CLC, (Applicant) v. Drs. Paul and John Rekai Centre (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, activity director, and office staff" (41 employees in unit) (*Having regard to the agreement of the parties*)

3170-87-R: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Rodney Ambulance Service Ltd. (Respondent)

Unit: "all employees of the respondent in the Village of Rodney, save and except supervisors, persons above the rank of supervisor, dispatcher, office and clerical staff and persons regularly employed for not more than 24 hours per week" (3 employees in unit) (*Having regard to the agreement of the parties*)

3171-87-R: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Marcantonio Plastering Company Limited (Respondent) v. O.P.C.M.I.A. Local 124 Ottawa Ontario (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

3204-87-R: Canadian Union of Public Employees (Applicant) v. The Durham Region Roman Catholic Separate School Board (Respondent)

Unit: "all employees of the respondent employed as teachers aides in the Regional Municipality of Durham, save and except supervisors and persons above the rank of supervisor" (41 employees in unit) (*Having regard to the agreement of the parties*)

3213-87-R: Ontario Secondary School Teachers' Federation (Applicant) v. Elgin County Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the County of Elgin" (54 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3223-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Kardinal Coatings Inc. (Respondent)

Unit: "all employees of the respondent at Dresden, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (66 employees in unit) (*Having regard to the agreement of the parties*)

3224-87-R: Canadian Union of Public Employees (Applicant) v. Mississauga Public Library Board (Respondent)

Unit: "all employees of the respondent in the City of Mississauga regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Department/Branch Head, Business Manager, Secretary to the Chief Librarian, Secretary to the Business Manager, Assistant Secretary to the Chief Librarian and Business Manager, Payroll/Personnel Officer, Secre-

tary to the Head of Central Branch and the Secretary to the Head of Technical Services" (212 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3245-87-R: Ontario Nurses' Association (Applicant) v. Reliacare Inc. (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at the Newcastle Health Care Centre in Newcastle, save and except the Director of Resident Care and those above the rank of Director of Resident Care" (8 employees in unit) (*Having regard to the agreement of the parties*)

3246-87-R: Canadian Union of Public Employees (Applicant) v. The Board of Education for the City of Etobicoke (Respondent)

Unit: "all office and clerical employees of the respondent in Etobicoke in its secondary schools, save and except supervisor, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of March 2nd, 1988" (92 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3247-87-R: Canadian Union of Public Employees (Applicant) v. St. Jacques Nursing Home (Respondent)

Unit #1: "all employees of the respondent in the Town of Embrun, Ontario, save and except professional medical staff, graduate and undergraduate nurses, pharmacists, dietitians, office and clerical employees, supervisors and persons above the rank of supervisor, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (48 employees in unit)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

3293-87-R: United Steelworkers of America (Applicant) v. Customized Transportation, Limited (Respondent)

Unit: "all employees of the respondent in the Town of Whitby, save and except supervisors, persons above the rank of supervisor, and office, clerical and sales staff" (10 employees in unit) (*Having regard to the agreement of the parties*)

3325-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Atcost Soil Drilling Incorporated (Respondent)

Unit: "all employees of the respondent working at and out of Concord, save and except foremen, persons above the rank of foreman, office and sales staff" (9 employees in unit)

3326-87-R: International Woodworkers of America (Applicant) v. Twin City Lumber Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except Secretary Treasurer, persons above the rank of Secretary Treasurer, office and sales staff" (4 employees in unit) (*Having regard to the agreement of the parties*)

3351-87-R: United Steelworkers of America (Applicant) v. Paxam Metals Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (28 employees in unit) (*Having regard to the agreement of the parties*)

3352-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Sousa Trim Carpentry Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of

Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3353-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Agidio Buffon, c.o.b. as A. P. Carpentry or as Towers Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3354-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Manny Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3355-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. North York Construction Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices, in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3356-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Triple R Construction Services (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3360-87-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Almico Plastics Limited (Respondent)

Unit: "all employees of the respondent in the City of Brockville, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit) (*Having regard to the agreement of the parties*)

3368-87-R: Canadian Union of Public Employees (Applicant) v. Sault Ste. Marie District Roman Catholic Separate School Board (Respondent)

Unit: "all office and clerical employees of the respondent in the City of Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor, purchasing agent, revenue officer, transportation and plan-

ning officer, secretary to the director of education, secretary to the superintendent of education and operation, secretary to the superintendent of curriculum and personnel, secretary to the superintendent of education, secretary to the administrator of plant and services, secretary to the co-ordinator of personnel and services, and employees in bargaining units for which any trade union held bargaining rights as of March 14, 1988" (50 employees in unit) (*Having regard to the agreement of the parties*)

3376-87-R: United Brotherhood of Carpenters & Joiners of America Local 27, (Applicant) v. Wood Trim Carpentry Co. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3377-87-R: United Food & Commercial Workers International Union AFL:CIO:CLC (Applicant) v. Port Colborne Poultry Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Port Colborne, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, chicken catchers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (132 employees in unit) (*Having regard to the agreement of the parties*)

3378-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Foothills Timber Limited (Respondent)

Unit: "all employees of the respondent working at and out of Atikokan, save and except foremen, persons above the rank of foreman, office, sales, and clerical staff" (24 employees in unit) (*Having regard to the agreement of the parties*)

3392-87-R: Ontario Public Service Employees Union (Applicant) v. Chedoke-McMaster Hospitals (Respondent)

Unit: "all technologists and technicians employed by the respondent in its medical laboratories and the Chedoke Hospital Division in the City of Hamilton regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except charge technologists and persons above the rank of charge technologist" (6 employees in unit) (*Having regard to the agreement of the parties*)

3393-87-R: Ontario Public Service Employees Union (Applicant) v. Chedoke-McMaster Hospitals (Respondent)

Unit: "all x-ray technologists employed by the respondent in its x-ray laboratory at the Chedoke Hospital Division in the City of Hamilton regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant chief technologists, persons above the rank of assistant chief technologist, and office and clerical staff" (8 employees in unit) (*Having regard to the agreement of the parties*)

3446-87-R: Canadian Union of Public Employees (Applicant) v. Credit Valley Hospital (Respondent)

Unit: "all employees of the respondent in Mississauga regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical personnel, office technical and clerical employees, supervisors, assistant directors, head chef, persons above the rank of supervisor, assistant director and head chef and persons in bargaining unit for which any trade union held bargaining rights as of March 17, 1988" (77 employees in unit) (*Having regard to the agreement of the parties*)

3476-87-R: United Steelworkers of America (Applicant) v. Performance Plastic Extrusions Ltd. (Respondent)

Unit: "all employees of the respondent in Mississauga, save and except supervisors, persons above the rank of supervisor, office, sales and technical staff" (33 employees in unit) (*Having regard to the agreement of the parties*)

3480-87-R: Labourers' International Union of North America, Local 493 (Applicant) v. Spie Construction Inc. (Respondent)

Unit: "all employees of the respondent employed in the warehouse and yard operations at North Bay, save and except foreman, persons above the rank of foreman, office and sales staff" (5 employees in unit)

3481-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Cana Drain Services Inc. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3482-87-R: Labourers' International Union of North America Local 183 (Applicant) v. Cana Drain Services Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3504-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Orkel Contracting Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

3506-87-R: Labourers International Union of North America, Local 506 (Applicant) v. Orkel Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

3533-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Applicant) v. K. W. O'Brien Plumbing and Heating Ltd. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Clarity Note*)

3537-87-R: Labourers International Union of North America, Local 183 (Applicant) v. 679517 Ontario Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3556-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. 589572 Ontario Ltd. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3569-87-R: Sheet Metal Workers' International Association Local 30 (Applicant) v. Bankley's Plumbing & Heating Ltd. (Respondent)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3584-87-R: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Canral Electric Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices, in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the Geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0040-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Pedro Costa Carpentry Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1430-87-R: International Woodworkers of America (Applicant) v. Lecours Lumber Co. Ltd. (Respondent)

Unit: "all employees of the respondent engaged in woods operations on the limits and on the worksites of the respondent, save and except foremen, persons above the rank of foreman, scalers and office and sales staff" (94 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	94
Number of persons who cast ballots	57
Number of ballots in favour of applicant	48
Number of ballots in favour of incumbent	9

1474-87-R: International Woodworkers of America (Applicant) v. Operations Forestieres Inc. (Respondent) v. The Lumber & Sawmill Workers Union, Local 2995 of the United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent who are engaged in woods operations on the limits (the term "limits" means timber limits granted to Malette Lumber by Spruce Falls and Abitibi Paper present and future) and on the work sites of the respondent, save and except foremen, persons above the rank of foreman, office and sales staff" (39 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	30
Number of ballots marked in favour of applicant	19
Number of ballots marked in favour of intervener	11

2699-87-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. CN Hotels Inc., c.o.b. as L'Hotel (Respondent) v. Canadian Brotherhood of Railway, Transport & General Workers (Intervener)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except executives, managers, assistant managers, sales staff, credit staff, personnel office employees, security officers, patrolmen, head house-keeper, maintenance supervisor, timekeepers, auditors, food, beverage and storeroom control, beverage supervisor, receiving, supervisors, employees of the front office, reservations, mail, key and information clerks, stenographers, receptionists, typists, accounting department, cashiers and all other office and clerical staff, recreation club attendants, inspectors, floor supervisors, friendly's supervisor, executive chef, sous chef, manager of pastry, maitre d's, assistant maitre d's, persons above the rank of supervisor, person regularly employed for not more than 24 hours per week and students employed during the school vacation period" (203 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	212
Number of persons who cast ballots	128
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	84
Number of ballots marked in favour of intervener	42

3047-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Sass Manufacturing Ltd. (Respondent) v. Construction Workers Local 53, CLAC (Intervener)

Unit: "all employees of the respondent working at or out of the City of Chatham, persons above the rank of non-working foreman and office staff" (50 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	50
Number of persons who cast ballots	49
Number of ballots marked in favour of applicant	28
Number of ballots marked in favour of intervener	21

3108-87-R: Labourers' International Union of North America, Local 527 (Applicant) v. Lithwick Family Holdings Ltd. (Respondent)

Unit: "all employees of the respondent engaged in cleaning services at The Champlain Towers, 200 Rideau Terrace, in the City of Ottawa, save and except resident manager, persons above the rank of resident manager, office, clerical and sales staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	2
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of incumbent	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0414-85-R: Union of Bank Employees (Ontario) Local 2104, Canadian Labour Congress (Applicant) v. National Trust (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at 1520 Danforth Avenue regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except branch manager, administration officer(s)/assistant branch manager(s) and administration officer trainees" (5 employees in unit)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

0564-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Dresser Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all office, clerical and technical employees of the respondent in the City of Cambridge, save and except supervisors and persons above the rank of supervisor and sales staff" (26 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	24
Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	10

2543-87-R: United Food & Commercial Workers International Union, AFL:CIO:CLC (Applicant) v. Canadian Harvest Process (1986) Ltd. (Respondent)

Unit: "all employees of the respondent in the City of St. Thomas, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (16 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	14
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	4

2768-87-R: Canadian Guards Association (Applicant) v. Carleton University Students' Association, Inc. (Respondent) v. Canadian Union of Public Employees (Intervener) v. Group of Employees (Objectors)

Unit: "all security guards employed by the respondent in the City of Ottawa, save and except managers and persons above the rank of manager" (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	2

3247-87-R: Canadian Union of Public Employees (Applicant) v. St. Jacques Nursing Home (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent in the Town of Embrun, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, graduate and undergraduate nurses, pharmacists, dietitians, office and clerical employees, supervisors and persons above the rank of supervisor" (13 employees in unit)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	1

Applications for Certification Dismissed Without Vote

0971-87-R: London and District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. Community Nursing Homes Limited (Respondent) (76 employees in Unit)

2407-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Walloy Excavating Company Limited (Respondent) (25 employees in unit)

2433-87-R: Jonathan Morris (Applicant) v. Energy & Chemical Workers Union Local 435 (Respondent) v. Servico Limited/Limitée (Intervener)

Unit #1: "all service station employees of the respondent at its Highway 400 Service Centre at King City, Ontario, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except shift supervisors, persons above the rank of shift supervisor and persons working in restaurant and food services operations" (10 employees in unit)

Unit #2: "all service station employees of the respondent at its Highway 400 Service Centre at King City, Ontario, save and except shift supervisors, persons above the rank of shift supervisor, persons working in restaurant and food services operations, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit)

2484-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Masters Construction Ltd. (Respondent) (5 employees in unit)

2837-87-R: Canadian Union of Public Employees (Applicant) v. City View Day Care Centre Incorporated (Respondent) (14 employees in unit)

2957-87-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Flexmaster Canada Limited (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (6 employees in unit) (*Having regard to the agreements of the parties*)

3242-87-R: United Steelworkers of America (Applicant) v. Emerson Radio Canada Ltd. (Respondent) (33 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1798-87-R: United Food & Commercial Workers International Union, AFL:CIO:CLC (Applicant) v. J. & P. Poultry Distributors Limited (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of Niagara, save and except forepersons, those above the rank of foreperson, office and sales staff" (141 employees in unit)

Number of names of persons on revised voters' list	141
Number of persons who cast ballots	119
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	114
Number of segregated ballots cast by persons whose names appear on voters' list	5
Number of ballots marked in favour of applicant	50
Number of ballots marked against applicant	64
Ballots segregated and not counted	5

3150-87-R: Aluminum Brick & Glass Workers International Union, AFL:CIO:CLC (Applicant) v. National Business Systems Inc. (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except managers, persons above the rank of manager, and office, clerical and sales staff" (90 employees in unit)

Number of names of persons on list as originally prepared by employer	90
Number of persons who cast ballots	79
Number of ballots marked in favour of applicant	34
Number of ballots marked against applicant	45

Applications for Certification Withdrawn

1856-83-R: Lumber & Sawmill Workers Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. E K T Industries Inc. (Respondent) v. International Union of Operating Engineers Local 793 (Intervener #1) v. United Brotherhood of Carpenters and Joiners of America, Local 1669 (Intervener #2) v. Labourers International Union of North America, Ontario Provincial District Council and Labourers International Union of North America, Local 607 (Intervener)

3364-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Eagle Earth Moving (Respondent)

0495-87-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128 (Applicant) v. Progress Fab Limited, Speciality Welding and Machine Co. Limited, and Alloy-Fab (Respondents)

3244-87-R: Energy & Chemical Workers Union (Applicant) v. Roxul Company, A Standard Industries Company (Division of Lafarge Canada Inc.) (Respondent)

3421-87-R: Canadian Paperworkers Union (Applicant) v. Cascade Canada Ltd. (Respondent) v. Lumber & Sawmill Workers Union, Local 2693 (Intervener)

3555-87-R: Canadian Union of Educational Workers (Applicant) v. McMaster University (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

2369-87-FC: United Food & Commercial Workers International Union AFL:CIO:CLC, Local 1230 (Applicant) v. Keve Services Limited c.o.b. as First Choice Haircutters (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0680-86-R: International Brotherhood of Electrical Workers Local 353 (Applicant) v. 584317 Ontario Limited c.o.b. as R. & H. Electric Co.; Concept Electric Inc. (Respondents) (*Dismissed*)

0649-87-R: Southern Ontario Newspaper Guild, Local 87 the Newspaper Guild (Applicant) v. The Globe and Mail Division of Canada Newspapers Ltd., Midco Trucking Service and Robert J. Lucier, Jr. c.o.b. as Lucier Express (Respondents) (*Dismissed*)

1204-87-R; 1205-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. 663042 Ontario Inc. c.o.b. as L. J. Systems (Respondents) (*Granted*)

1300-87-R: Labourers' International of North America Ontario Provincial District Council and Labourers International of North America Local 1036 (Applicants) v. Smale Bros. Company Limited and 657572 Ontario Inc. c.o.b. as Double S Construction (Respondents) v. A Group of Employees (Interveners) (*Granted*) (*Having regard to the agreement of the parties*)

2665-87-R: Ontario Nurses' Association Staff Union (Applicant) v. Ontario Nurses' Association & ONA Properties Limited (Respondents) (*Withdrawn*)

2668-87-R; 2669-87-R: United Rubber, Cork, Linoleum & Plastic Workers of America AFL:CIO:CLC, Local 347 (Applicant) v. Sterling Rubber (1985) Inc. and Sterling Rubber Limited (Respondents) (*Dismissed*)

3286-87-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Glebe Centre Inc. (Respondent) (*Withdrawn*)

SALE OF A BUSINESS

0649-87-R; 0650-87-R: Southern Ontario Newspaper Guild, Local 87 the Newspaper Guild (Applicant) v. The Globe and Mail Division of Canada Newspapers Ltd., Midco Trucking Service, Robert J. Lucier, Jr. c.o.b. as Lucier Express (Respondent) (*Dismissed*)

1204-87-R; 1205-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. 663042 Ontario Inc. c.o.b. as Whitehall Plumbing & Heating and Leonard J. Maltby c.o.b. as L. J. Systems (Respondent) (*Granted*)

1300-87-R; 1301-87-G: Labourers' International of North America Ontario Provincial District Council and Labourers' International of North America Local 1036 (Applicants) v. Smale Bros. Company Limited and 657572 Ontario Inc. c.o.b. as Double S Construction (Respondents) v. A Group of Employees (Interveners) (*Granted*) (*Having regard to the agreement of the parties*)

3285-87-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Glebe Centre Inc. (Respondent) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

1487-87-R: United Food & Commercial Workers International Union, Local 326W (Applicant) v. International Vac Pac Inc. (Respondent) (*Granted*)

1492-87-R: United Food & Commercial Workers, Local 173W (Applicant) v. Labatt's Ontario Breweries (Waterloo Plant) (Respondent) (*Granted*)

3154-87-R: The United Food & Commercial Workers International Union, Local 175 (Applicant) v. Viletta China Canada Limited (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2529-87-R; 2530-87-R: Ian Gillen, Catherine Buttigieg (Applicants) v. Toronto Typographical Union No. 91 (Respondent) v. Fitzhenry & Whiteside Ltd. (Intervener)

Unit #1: "all office employees of Fitzhenry & Whiteside Ltd. at Markham, Ontario save and except Data Processing Manager, Secretary to the President, Accountant and outside sales staff, and students employed during the school vacation period" (42 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	42
Number of persons who cast ballots	39
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	33

Unit #2: "all its warehouse employees at Fitzhenry & Whiteside Ltd. at Markham, Ontario save and except supervisor, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, long distance truck driver, and students employed during the school vacation period" (38 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	38
Number of persons who cast ballots	34
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	24

2547-87-R: Bradley Smith (Applicant) v. United Steelworkers of America (Respondent) v. Airtex Manufacturing Ltd. (Intervener)

Unit: "all employees of Airtex Manufacturing Ltd. in Newmarket, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and service technicians" (9 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	9
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	9

2550-87-R: Marilyn Lech (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC, Local 1000 (Respondent) v. Sears Canada Inc. (Intervener) (*Dismissed*)

2569-87-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Applicant) v. Oak's Inn (Wallaceburg) Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Wallaceburg, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (28 employees in unit) (*Dismissed*)

Number of names of persons on list as originally prepared by employer	28
Number of persons who cast ballots	25
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	7

2570-87-R: Prima Jeanne Schwab, on her own behalf and on behalf of the employees of Elite Carpet Manufacturing Limited (Applicant) v. United Food & Commercial Workers, Local 175 (Respondent)

Unit: "all employees employed by the Company at its plant in the City of Waterloo, Ontario, save and except foreman, persons above the rank of foreman, office and sales staff, dyers, artists, lab technicians, students employed during the summer vacation period and persons employed for not more than 24 hours per week" (47 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	47
Number of persons who cast ballots	39
Number of ballots marked in favour of respondent	8
Number of ballots marked against respondent	31

2955-87-R: Service Employees International Union, Local 204 affiliated with the S.E.I.U., AFL:CIO:CLC (Applicant) v. The Ontario Cancer Institute (incorporating The Princess Margaret Hospital) (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, registered nurses, graduate nurses, under graduate nurses, paramedical personnel, scientific staff, persons engaged in research work, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (220 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	220
Number of persons who cast ballots	195
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	194
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	118
Number of ballots marked against respondent	75
Ballots segregated and not counted	1

3014-87-R: Giuseppe DePieri (Applicant) v. United Brotherhood of Carpenters & Joiners of America Local 2679 (Respondent) v. Luke's Carpentry Shop a division of Colonar Holdings Limited (Intervener) (*Withdrawn*)

3085-87-R: Henry Postma Jr. along with 7 other B.M.I. Employees (Applicant) v. Union 296 G Aluminum, Brick & Glass Workers International Union (Respondent) (*Dismissed*)

3180-87-R: Dan Tiede (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) Local 27 (Respondent) v. London Generator Services Ltd. (Intervener) (*Granted*)

3198-87-R: Douglas Eastman (Applicant) v. The International Brotherhood of Electrical Workers Local 586 (Respondent) (*Withdrawn*)

3361-87-R: S. MacDonald, et al. (Applicants) v. The Union of Bank Employees, Local 2104 (Respondent) (*Dismissed*)

MINISTERIAL REFERENCE (CONCILIATION OFFICER)

0974-87-M: Ellis-Don Limited (Employer) v. United Brotherhood of Carpenters & Joiners of America, Local 1946 (Trade Union)

2995-86-M: Oakridge Villa Nursing Home (Extendicare Health Services Inc.) (Employer) v. Ontario Nurses' Association (Trade Union)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2516-86-U; 2693-86-U: Extendicare Health Services Inc. (Complainant) v. Ontario Nurses' Association (Respondent) (*Dismissed*)

2826-86-U: Southern Ontario Newspaper Guild, Local 87 the Newspaper Guild (Complainant) v. The Globe and Mail Division of Canada Newspapers Ltd. (Respondent) (*Dismissed*)

3381-86-U: Daniel A. Goy (Complainant) v. International Brotherhood of Electrical Workers, Local 894, Oshawa, R. G. Hill BM/FS and Dave Cunningham, ABM (Respondent) v. Electrical Power Systems Construction Association (Intervener #1) v. IBEW Electrical Power Systems Construction Council of Ontario (Intervener #2) (*Withdrawn*)

0162-87-U: Madeleine Cloutier (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada, (CAW-Canada), Local 195 (Respondent) v. Peerless-Cascade Plastics Ltd. (Intervener) (*Dismissed*)

0240-87-U: Donald R. Barratt (Complainant) v. P. J. Gernon, L. Gernon, S. McAlarey of Greenfield Painting Services (Respondents) (*Dismissed*)

1274-87-U: United Steelworkers of America (Complainant) v. Benoma Metal Products Limited & Oliver Rintamki (Respondents) (*Withdrawn*)

1335-87-U: International Union of Operating Engineers, Local 793 (Complainant) v. Ottawa Greenbelt Construction Ltd. (Respondent) (*Withdrawn*)

1657-87-U: Richard A. Askey (Complainant) v. Gilbey Canada Inc., Peter Blazier, David Hyde, John Steel and William C. Wright (Respondents) v. Teamsters Union Local 938 (Intervener) (*Withdrawn*)

1707-87-U: Peter Bernhardt and James Kinney (Complainants) v. The Corporation of the City of Kitchener (Respondent) (*Withdrawn*)

1759-87-U: Marlene Gimblett (Complainant) v. Canadian Auto Workers, Local 222 (Respondent) (*Withdrawn*)

1772-87-U: Local 576, Cement, Lime, Gypsum & Allied Workers Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Forgers & Helpers (Complainant) v. Hamilton Automatic Vending Company Limited (Respondent) (*Withdrawn*)

1912-87-U: United Food & Commercial Workers' International Union, Local 175 (Complainant) v. Excel Coach Lines Limited (Respondent) (*Withdrawn*)

1958-87-U: Canadian Union of Public Employees, Local 1989 (Complainant) v. Mississauga Public Library Board (Respondent) (*Withdrawn*)

2129-87-U: Mechanical Contractors Association Ontario on its own behalf and on behalf of its member contractors and Mechanical Trade Bargaining Committee of the Mechanical Contractors Association of Ontario (Complainants) v. Mechanical Contractors Association London, Nicholls Radtke and Associates Ltd., Besterd Heating and Plumbing Ltd., Gerald J. Hennessy and William N. Besterd (Respondents) v. United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 593 (Intervener #1) v. The Ontario Pipe Trades Council (Intervener #2) (*Withdrawn*)

2130-87-U: Mechanical Contractors Association Ontario on its own behalf and on behalf of its member contractors and Mechanical Trade Bargaining Committee of the Mechanical Contractors Association of Ontario (Complainants) v. Mechanical Contractors Association London, Nicholls Radtke and Associates Ltd., Best-

erd Heating and Plumbing Ltd., Gerald J. Hennessy and William N. Besterd (Respondents) v. The Ontario Pipe Trades Council (Intervener) (*Withdrawn*)

2176-87-U: United Steelworkers of America (Complainant) v. Porcupine Powder Company Inc. and C.I.L. Inc. (Respondents) (*Withdrawn*)

2478-87-U; 2479-87-U: Frank McPherson (Complainant) v. Labourers' International Union, Local 506 (Respondent) v. Design Craft (Interested Party) (*Dismissed*)

2509-87-U: Ontario Public Service Employees Union (Complainant) v. Stothers Centre for Children and Families (Respondent) (*Withdrawn*)

2572-87-U: Labourers' International Union of North America, Local 183 (Complainant) v. Bezac Developments Limited and Niclyn Productions Inc., c.o.b. as Glen Orchard Homes (Respondents) (*Withdrawn*)

2607-87-U: Ontario Nurses' Association (Complainant) v. Victorian Order of Nurses, Lakehead Branch (Respondent) (*Withdrawn*)

2611-87-U: Mechanical Contractors Association London, Nicholls Radtke & Associates Ltd., Besterd Heating and Plumbing Ltd., Gerald J. Hennessy and William N. Besterd (Complainants) v. Mechanical Contractors Association, W. J. McCarron and J. Sneider (Respondents) v. Mechanical Contractors Association Kitchener (Zone 7) (Intervener #1) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 593 (Intervener #2) v. The Ontario Pipe Trades Council (Intervener #3) (*Withdrawn*)

2612-87-U: Mechanical Contractors Association London, Nicholls Radtke & Associates Ltd., Besterd Heating and Plumbing Ltd., Gerald J. Hennessy and William N. Besterd (Complainants) v. Mechanical Contractors Association, W. J. McCarron and J. Sneider (Respondents) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 593 (Intervener #1) v. The Ontario Pipe Trades Council (Intervener #2) (*Withdrawn*)

2658-87-U: Claude Desormeaux (Complainant) v. Canadian Union of Public Employees Local 2292 (Respondent) v. Corporation of the Town of Rockland (Intervener) (*Withdrawn*)

2661-87-U: Lucien Martin (Complainant) v. Canadian Union of Public Employees Local 2292 (Respondent) v. Corporation of the Town of Rockland (Intervener) (*Withdrawn*)

2730-87-U: Canadian Union of Public Employees Local 210 (Complainant) v. Corporation of the City of Timmins (Respondent) (*Withdrawn*)

2765-87-U: International Brotherhood of Electrical Workers Local 1744 (Complainant) v. Boise Cascade Canada Limited (Respondent) (*Dismissed*)

2781-87-U: Canadian Union of Public Employees (Complainant) v. The Sutton and District Association for the Mentally Retarded (Respondent) (*Withdrawn*)

2891-87-U: Labourers' International Union of North America, Local 506 (Complainant) v. Masters Construction Limited (Respondent) (*Withdrawn*)

2932-87-U: Ontario Nurses' Association (Complainant) v. Carewell Corporation (Canada) Ltd. (Respondent) (*Withdrawn*)

2967-87-U; 3234-87-U; 0044-88-U: James Hicks (Complainant) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 251 (Respondents) v. Nestle Enterprises Ltd., c.o.b. as Libby, McNeill & Libby of Canada (Intervener) (*Dismissed*)

2970-87-U: The Energy & Chemical Workers Union (Complainant) v. Rollit Products Limited (Respondent) (*Withdrawn*)

2988-87-U: Ramon Lopez (Complainant) v. Service Employees International Union, Local 204 (Respondent) (*Withdrawn*)

2991-87-U: Canadian Union of Brewery and General Workers, 325 (Complainant) v. Carling O'Keefe Breweries of Canada Limited (Respondent) (*Withdrawn*)

2985-87-U: The Corporation of the City of Thunder Bay (Complainant) v. International Brotherhood of Electrical Workers (I.B.E.W.), Local 339 Craft Workers (Respondent) (*Withdrawn*)

3040-87-U: Canadian Paperworkers Union Local 192 and Local 228 (Complainant) v. The Beaver Wood Fibre Company Limited (Respondent) (*Withdrawn*)

3041-87-U: United Brotherhood of Carpenters and Joiners of America, Local Union 27 (Complainant) v. Ultra Interiors Inc. (Respondent) (*Dismissed*)

3052-87-U: Hotels, Clubs, Restaurants, Taverns, Employees Union, Local 261 (Complainant) v. National Press Club (Respondent) (*Withdrawn*)

3059-87-U: United Electrical Radio & Machine Workers of Canada (UE) (Complainant) v. Modular Controls Ltd. (Respondent) (*Withdrawn*)

3168-87-U: Canadian Paperworkers Union (Complainant) v. Karl Gutmann Incorporated (Respondent) (*Withdrawn*)

3263-87-U: Great Lakes Fishermen & Allied Workers' Union (Complainant) v. John Taylor Fishery Ltd. (Respondent) (*Withdrawn*)

3300-87-U: Sydney Bookal (Complainant) v. Gary Lilley (C.A.W. Rep.) (Respondent) (*Withdrawn*)

3332-87-U: Vince Dibiasi (Complainant) v. United Brotherhood of Carpenters & Joiners of America (Respondent) (*Withdrawn*)

3345-87-U: George Banton (Complainant) v. U.F.C.W. Union (Respondent) (*Withdrawn*)

3349-87-U: United Steelworkers of America (Complainant) v. National Refrigeration Ltd. (Respondent) (*Withdrawn*)

3426-87-U: Canadian Union of Public Employees and its Local 1600 (Complainant) v. Board of Management of the Metropolitan Toronto Zoo (Respondent) (*Withdrawn*)

3432-87-U: Service Employees' International Union, Local 204 (Complainant) v. Glebe Manor (Respondent) (*Withdrawn*)

3483-87-U: Construction Workers Local 53, CLAC (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW - Canada) (Respondent) (*Withdrawn*)

3578-87-U: Vincenzo Di Pierro (Complainant) v. CUPE Local 79 and Municipality of Metropolitan Toronto (Respondents) (*Withdrawn*)

3579-87-U: United Brotherhood of Carpenters & Joiners of America, Local 3054 (Complainant) v. Selinger Wood Ltd. (Respondent) (*Withdrawn*)

0022-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (C.A.W. - Canada) (Complainant) v. Riverside Fabricating Ltd. (Respondent) (*Withdrawn*)

0031-88-U: Laura Buck, Mary Malloch, Helen Searle, Carol Pearson, Lynn Digby (full time RNA's Etobicoke General Hospital, (Complainant) v. Service Employees International Union Local 204 (Respondent) (*Withdrawn*)

0073-88-U: Anthony Newsome (Complainant) v. Naime Yamine (Respondent) (*Dismissed*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

3330-87-M: Lester Eby (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW - Canada), Local 1917 (Respondent Trade Union) v. VME Equipment of Canada Ltd. (Respondent Employer) (*Granted*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3316-87-M: Glove Reconditioners, A Division of Canadian Linen Supply Co. Ltd., of Stoney Creek, Ontario (Employer) and Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

3413-87-M: Essex Linen Supply, Windsor, Ontario (Employer) and Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

TRUSTEESHIP

T-144-86: Canadian Union of Public Employees (Applicant) v. Canadian Union of Public Employees Local 16 (Respondent) (*Granted*)

FINANCIAL STATEMENT

3003-87-M: James Jefferson (Complainant) v. United Steelworkers of America - Local 2699 (Respondent) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2451-85-M: London & District Service Workers' Union Local 220 (Applicant) v. St. Mary's General Hospital (Kitchener) (Respondent) (*Dismissed*)

0896-86-M: The Windsor Star (Applicant) v. Windsor Newspaper Guild Local 239 (Respondent) (*Granted*)

2195-86-M: St. Mary's General Hospital (Kitchener) Office & Clerical Bargaining Unit (Part-time) (Applicant) v. London & District Service Workers' Union, Local 220 (Respondent) (*Dismissed*)

2502-86-M: The Ottawa-Carleton Public Employees' Union, Local 503 (CUPE) (Applicant) v. The Corporation of the City of Ottawa (Respondent) (*Granted*)

3315-86-M: International Union of Operating Engineers, Local 793 (Applicant) v. Stephens and Rankin Inc. (Respondent) (*Withdrawn*)

2310-87-M: Norfolk General Hospital (Applicant) v. London & District Service Workers' Union, Local 220 (Respondent) (*Dismissed*)

2387-87-M: C.U.P.E., Local 1225 (Applicant) v. Hyland Crest Senior Citizens' Home (Respondent) (*Withdrawn*)

2640-87-M: Canadian Union of Public Employees (Applicant) v. Toronto General Hospital (Respondent) (*Dismissed*)

2780-87-M: C.U.P.E., Local 282 (Applicant) v. The Brant County Board of Education (Respondent) (*Withdrawn*)

3062-87-M: Oxford County Roman Catholic Separate School Board (Applicant) v. Canadian Union of Public Employees Local 1146 (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

1420-87-OH: Kevin Harrington, Wayne Warren, United Steelworkers of America Local 4632 (Complainants) v. Edward Kruger (Respondent) (*Withdrawn*)

2554-87-OH: Canadian Union of Public Employees, Local 87 (Outside) (Complainant), v. Corporation of the City of Thunder Bay (Respondent) (*Granted*)

3142-87-OH: Gary Allan Clayton (Complainant) v. Quad Bindery Company, and Brian Gagnon (Respondents) (*Withdrawn*)

3232-87-OH: Local 368, Energy Chemical Workers Union (Complainant) v. Wyeth Ltd. (Respondent) (*Withdrawn*)

0108-88-OH: David Fitzgerald (Complainant) v. Southern Wood Products Limited (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

2087-83-M: Labourers International Union of North America, Ontario Provincial District Council; and Labourers International Union of North America, Local 607 (Applicants) v. E K T Industries Inc., Tamarron Group Inc., Tamarron Construction Limited (Respondents) (*Withdrawn*)

0277-87-G: Ontario Council of the International Brotherhood of Painters & Allied Trades (Applicant) v. Harbridge & Cross Limited (Respondent) v. Toronto Construction Association (Intervener) (*Granted*)

1017-87-G: The Mechanical Construction Association of Hamilton (Applicant) v. The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 67 (Respondent) (*Dismissed*)

1203-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada, Local Union 46 (Applicant) v. 663042 Ontario Inc. c.o.b. as Whitehall Plumbing and Heating (Respondent) (*Granted*)

1301-87-G: Labourers' International of North America Ontario Provincial District Council and Labourers' International of North America Local 1036 (Applicants) v. Smale Bros. Company Ltd. and 657572 Ontario Inc. c.o.b. as Double S Construction (Respondents) v. A Group of Employees (Intervenors) (*Granted*)

1349-87-G: United Brotherhood of Carpenters' & Joiners of America, Local Union 27 (Applicant) v. G.I.C. Interior Ltd. (Respondent) (*Withdrawn*)

1414-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Paving Company Limited (Respondent) (*Withdrawn*)

1582-87-G: International Union of Operating Engineers, Local 793 (Applicant) v. Stephens and Rankin Inc. (Respondent) (*Withdrawn*)

1826-87-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local Union 721 (Applicant) v. Habit Steel Construction (Respondent) (*Granted*)

1901-87-G: International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Division Construction Ltd. (Respondent) (*Withdrawn*)

1902-87-G: International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. James A. Rice Limited (Respondent) (*Withdrawn*)

2490-87-G: Labourers' International Union of North America, Local 527 (Applicant) v. R. J. Nicol Construction (1975) Ltd. (Respondent) (*Withdrawn*)

2726-87-G: Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. Neiva Carpentry (Respondent) (*Withdrawn*)

2777-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Ellis Don Limited (Respondent) (*Granted*)

2817-87-G: Labourers International Union of North America, Local 506 (Applicant) v. Runnymede Development Corporation Ltd. (Respondent) (*Granted*)

2933-87-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Habit Steel Corporation Ltd. (Respondent) (*Granted*)

3049-87-G: International Union of Bricklayers & Allied Craftsmen Local 12 and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. City of Kitchener (Respondent) (*Granted*)

3190-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Lucy Construction Ltd. (Respondent) (*Withdrawn*)

3194-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pachino Construction Co. Ltd. (Respondent) (*Withdrawn*)

3199-87-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Ben Plastering Ltd. c.o.b. as Belmont Plastering Co. (Respondent) (*Withdrawn*)

3207-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Campbell-Cox Ltd. (Respondent) (*Withdrawn*)

3250-87-G: International Brotherhood of Electrical Workers Local Union 105 of the IBEW Construction Council of Ontario (Applicant) v. Jaddco Anderson Limited (Respondent) (*Granted*)

3287-87-G: International Union of Operating Engineers, Local 793 (Applicant) v. S.C.A.I. Construction (Division of 639739 Ontario Ltd.) and S.C.A.I. Construction Ltd. (Respondent) (*Granted*)

3359-87-G: Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. Casabilt Contractor Ltd. (Respondent) (*Withdrawn*)

3380-87-G: International Brotherhood of Painters & Allied Trades - Local 1824 (Applicant) v. Mike's Painting & Decorating Ltd. (Respondent) (*Granted*)

3386-87-G: International Association of Bridge, Structural & Ornamental Iron Workers, Local Union 721 (Applicant) v. Art Metal Railing Company (Respondent) (*Granted*)

3395-87-G: Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. V.G.A. Carpentry (Respondent) (*Granted*)

3396-87-G: Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. Lido Drywall & Carpentry Ltd. (Respondent) (*Granted*)

3397-87-G: Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. Professional Carpentry (Respondent) (*Withdrawn*)

3398-87-G: Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. Metro Carpentry Limited (Respondent) (*Granted*)

3399-87-G: Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. The Way Trim (Respondent) (*Withdrawn*)

3402-87-G: Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. Colangelo Carpentry Co. Ltd. (Respondent) (*Granted*)

3403-87-G: Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. G & A Dimopoulos Carpenters (Respondent) (*Granted*)

3405-87-G: Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. Caledana Carpentry Construction (Respondent) (*Granted*)

3406-87-G: Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. Matera Carpentry Contractors (Respondent) (*Withdrawn*)

3407-87-G: Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. C & M Carpentry (Respondent) (*Granted*)

3409-87-G: Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. Bancheri Carpenters (Respondent) (*Granted*)

3455-87-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Drycoustics Construction Ltd. (*Granted*)

3474-87-G: Drywall, Acoustic, Lathing & Insulation, Local 675, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Crest Drywall & Acoustics Ltd. (Respondent) (*Withdrawn*)

3495-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Professional Construction Co-ordinators Ltd. (Respondent) (*Withdrawn*)

3451-87-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Losereit Sales & Services Ltd. (Respondent) (*Granted*)

3452-87-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Losereit Sales & Services Ltd. (Respondent) (*Granted*)

3453-87-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Losereit Sales & Services Ltd. (Respondent) (*Granted*)

3491-87-G: Sheet Metal Workers International Association Local 562 (Applicant) v. Thackeray Roofing Ltd. (Respondent) (*Granted*)

3518-87-G: International Brotherhood of Sheet Metal Workers, Local 539 (Applicant) v. Gallaway Roofers Ltd. (Respondent) (*Granted*)

3521-87-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Northend Interiors Ltd. (Respondent) (*Granted*)

3522-87-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Rally Paint Ltd. (Respondent) (*Granted*)

3527-87-G: International Brotherhood of Electrical Workers Local 773 of the IBEW Construction Council of Ontario (Applicant) v. Ricom Electric and Maintenance Ltd. (Respondent) (*Withdrawn*)

3539-87-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Co-Fo Concrete Forming Construction Ltd. (Respondent) (*Granted*)

3454-87-G: United Brotherhood of Carpenters' & Joiners of America, Local 785 (Applicant) v. W.H. Ellinger Limited (Respondent) (*Withdrawn*)

3503-87-G: Labourers' International Union of North America, Local 506 (Applicant) v. Ellis Don Limited (Respondent) (*Withdrawn*)

0024-88-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Canada Wide Reinforcing Steel Co. Ltd. (Respondent) (*Withdrawn*)

0036-88-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Mostar Interior Construction (Respondent) (*Withdrawn*)

0043-88-G: Labourers' International Union of North America Local 1036 (Applicant) v. The Foundation Co. of Canada Ltd. (Respondent) (*Withdrawn*)

0088-88-G: Labourers International Union of North America Local 506 (Applicant) v. Runnymede Development Corporation Limited (Respondent) (*Granted*)

0105-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Parity Drywall (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1503-83-M: International Brotherhood of Electrical Workers Local 1687 (Applicant) v. F.D.V. Construction Limited, 515112 Ontario Ltd. c.o.b. as Bluebird Construction, 556631 Ontario Ltd. c.o.b. as G.P. Construction, and The Electrical Contractors' Association of Ontario (Respondents) (*Denied*)

0916-84-U: International Brotherhood of Electrical Workers Local 1687 (Applicant) v. F.D.V. Construction Limited, 515112 Ontario Ltd. c.o.b. as Bluebird Construction, 556631 Ontario Ltd. c.o.b. as G.P. Construction, William Moffat and Graham Pope (Respondents) (*Denied*)

2143-87-M: Ontario Nurses' Association (Applicant) v. Whitby General Hospital (Respondent) (*Denied*)

2299-87-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Engineered Electrical Controls Ltd. (Respondent) (*Denied*)

3225-87-U: Dario Castellucci C.A.W. #67568 (Complainant) v. Canadian Auto Workers, et al., Local 444 Officers of C.A.W. Local 444, President & Bros. K. Girard, Bros. Harvey Courtland, Benefit Rep., Bros. Ken Lewenza, Plant Chairperson, Bros. Gino Dominato, Bros. Fraser Gillis, Bros. Red Wilson, Chrysler Canada et al. & President & Labour Relations Office, Terry Nichols (Respondents) (*Denied*)

RIGHT OF ACCESS

3520-87-M: Labourers' International Union of North America, Local 493 and Sudbury Mine, Mill & Smelter Workers' Union, Local No. 598 (Applicants) v. Noramco Mining Corporation (Respondent) (*Granted*)

*Ontario Labour Relations Board,
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ONTARIO LABOUR RELATIONS BOARD REPORTS



June 1988



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1988] OLRB REP. JUNE

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Listed for further hearing on issue of whether s.12 contravenes freedom of association in Charter

PINKERTON'S OF CANADA LTD.; RE C.G.A. 613

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0458-88-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. 502858 Ontario Limited, Respondent

Bargaining Unit - Certification - Dependent Contractor - Parties agreeing on all employee bargaining unit description but disagreeing as to whether certain persons ought to be excluded - Regardless of the outcome of this issue union entitled to certification - Interim certificate issuing pending determination of issue of whether these persons are dependent contractors and therefore entitled to a distinct unit

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *R. M. Sloan* and *R. R. Montague*.

DECISION OF THE BOARD; June 30, 1988

1. The name of the respondent is hereby amended to read: "502858 Ontario Limited".
2. This is an application for certification in which the parties reached agreement on all matters in dispute between them, except as set out hereunder, and further agreed to waive their right to a formal hearing in the matter.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. The parties were agreed that the bargaining unit should be described in terms of all employees of the respondent at its Ottawa Towing Service Division in the Regional Municipality of Ottawa-Carleton, save and except managers, persons above the rank of manager, office staff and dispatchers. The parties remained in disagreement over whether seven individual drivers ought to be included within the bargaining unit so described. The respondent challenges the inclusion of the seven individuals on the grounds that they are not employees, but are independent contractors and therefore ought to be excluded. The applicant takes the contrary position and submits that the seven individuals are employees and therefore are properly included within the bargaining unit. In light of this dispute, a Board Officer is hereby appointed and authorized to inquire into and report back to the Board with respect to this dispute over the inclusion of these seven individuals: Guy Allard, Roland Ayotte, Gregory Georganais, Gilles Proulx, Richard Tennant, Ivan Dorey and Mike O'Connell.
5. The Board has determined, however, that the applicant's right to certification cannot be affected by the Boards ultimate decision respecting whether any or all of these seven individuals will be included or excluded from the bargaining unit. On the basis of all the evidence before it, the Board is satisfied that regardless of the outcome with respect to any of these individuals, more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 2, 1988, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
6. Therefore, pursuant to the Board's discretion under section 6(2) of the Act, Board certifies the applicant for all employees of the respondent at its Ottawa Towing Service Division in the Regional Municipality of Ottawa-Carleton, save and except managers, persons above the rank of manager, office staff and dispatchers. The seven individuals challenged will remain excluded from the bargaining unit until the resolution of their status.

7. A formal certificate must await the final determination of the bargaining unit.

8. Although the Board ordinarily issues a final certificate in circumstances where the bargaining unit description is not disputed and where regardless of the resolution of the status of disputed individuals an applicant union would be in a certifiable position (see, *Robin Hood Multi-foods* [1985] OLRB Rep. July 1159), in this case it is not appropriate to do so, having regard to the provisions of section 6(5) of the Act. It may be that the Board will determine that any or all of the individuals in question are dependent contractors within the meaning of the Act, and in such circumstances the Board might ultimately conclude that the dependent contractors should be represented in a distinct bargaining unit. Issuing an interim certificate will allow the Board the necessary flexibility to fashion two bargaining units, should the circumstances so demand. For these reasons, an interim certificate only has been issued.

0682-87-R United Steelworkers of America, Applicant v. Aluminart Products Ltd., Respondent v. Group of Employees, Objectors

Certification - Representation - Whether lead hands exercising managerial functions - One lead hand excluded from unit - Whether or not the ballots which had been ruled by the Returning Officer to be spoiled ballots were in fact spoiled ballots - Board ruling that the choice of the voters who marked the ballots in question was not clear - Ruling of Returning Officer affirmed

BEFORE: *R. A. Furness*, Vice-Chair, and Board Members *B. L. Armstrong* and *J. A. Ronson*.

APPEARANCES: *C. Lace* and *Brando Paris* for the applicant; *Cheryl J. Elliot*, *Jack Dorsey* and *Sam Caccamo* for the respondent; *Tavio Giannini* and *Joe Jamieson* for the objectors.

DECISION OF THE BOARD; June 30, 1988

1. In a decision dated July 9, 1987, the Board directed the taking of a representation vote with respect to a defined bargaining unit. In paragraphs nine and ten of that decision, the Board noted as follows:

9. The parties are in disagreement concerning whether five persons are excluded by virtue of the provisions of section 1(3)(b) of the Act. In these circumstances, in the event that *J. Almeida*, *F. Cisneros*, *O. Ford*, *J. Martin* or *R. Parrales* cast ballots in the representation vote, their ballots are to be segregated pending a further direction by the Board or a resolution of their inclusion in or exclusion from the bargaining unit by the parties.

10. A Board Officer is authorized to inquire into a report back to the Board on the duties and responsibilities of the persons in dispute.

2. The representation vote in this matter was held on July 24, 1987. *J. Almeida*, *F. Cisneros*, *O. Ford*, *J. Martins* and *R. Parrales* cast segregated ballots. There were two ballots cast which were ruled by the Returning Officer to be spoiled ballots. The report of the Labour Relations Officer was dated November 24, 1987. This matter came on for hearing on February 4, April 14 and April 18, 1988. The purpose of the hearing was stated in the Notice of Hearing, Form 8, as being “[to hear] the representations of the parties regarding the Labour Relations Officer’s Report dated November 24, 1987, and all outstanding matters”. The Board heard extremely lengthy representa-

tions on (i) whether the five persons referred to in this paragraph exercised managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act* and (ii) whether or not the ballots which had been ruled by the Returning Officer to be spoiled ballots were in fact spoiled ballots.

3. The Board will initially consider whether J. Almeida, F. Cisneros, O. Ford, J. Martins and R. Parrales exercise managerial functions within the meaning of section 1(3)(b) of the Act. The principles to be applied in determining whether these persons exercise managerial functions were not in dispute. The parties, however, differed in the application of the principles to the facts in this matter. The purpose of the Act is to facilitate collective bargaining. There are, of course, lines to be drawn so that persons will not find themselves in positions of conflict. Persons who exercise managerial functions within the meaning of section 1(3)(b) would find themselves in a position of conflict if they were included in a bargaining unit. The Board summarized its approach to its discretion under section 1(3)(b) and referred to conflict of interest in *Inglis Limited* [1976] OLRB Rep. June 270, where it stated at pages 271-272:

6. The jurisprudence of this Board reveals that the discretion of the Board under section 1(3)(b) operates on two levels. It operates *firstly* to exclude persons who can affect the terms and conditions of employment and/or the employment relationship of those in the employ of the organization, and *secondly* it operates to exclude those who make decisions with respect to policy and the overall operation of the organization. In theory it can be easily seen that persons who exercise either or both types of functions would find themselves in a conflict of interest if included within a bargaining unit of other employees. In practice, however, it is often difficult to distinguish those who make decisions which would precipitate a conflict of interest from those who implement the decisions of others or who operate at a level of decision making which would not result in a conflict if they were found to be employees for purposes of the Act. The Board in the course of applying section 1(3)(b) has developed certain insights and tests which are helpful in determining the status of the persons who are in dispute in the instant case.

7. It is helpful to note at this point that there are two types of persons whose recommendations can potentially affect the terms and conditions of employment and/or the employment relationship. There is the first line supervisor, traditionally referred to as the foreman who directs the daily flow of work and who may or may not be responsible for a number of ancillary matters such as the imposition of discipline, the granting of time off, the scheduling of overtime, the recording of attendance etc. He may even hire and fire. There is also the technical expert whether it be in the area of time study, methods or process engineering whose responsibilities and decision making capabilities can affect not only terms and conditions of employment (i.e. incentives, production bonus) but the employment relationship itself (i.e. lay-off). The Board in assessing the duties and responsibilities of a front line supervisor has been cognizant of the policy and organization restraints which now dilute his decision making authority and has developed the test of "effective recommendations."

"This concept has come to mean that if a person spends most of his time supervising the work of others *and* makes effective recommendations that materially affect the conditions of employment of those supervised, the Board may conclude that such persons are exercising managerial functions. In this sense an effective recommendation is a serious recommendation that the evidence demonstrates is usually acted upon, and therefore a recommendation that materially affects the economic lives of employees." (See *McIntyre Porcupine* case, *supra*).

The Board recognizes that although the foreman may not have the final and undisputed authority which he once did, his power of effective recommendation with respect to discipline, promotion, demotion, time off etc. is a managerial function within the meaning of section 1(3)(b). The foreman who effectively recommends in these areas would find himself in a conflict of interest if placed in a bargaining unit with other employees. It is important to note that it is not the supervisory aspect of his function per se which creates the potential for conflict but the power of effective recommendation as it effects the employment relationship of other employees.

The applicant informed the Board that it based its assertion that these five persons exercised managerial functions within the meaning of section 1(3)(b) on the basis that they could effect the terms and conditions of employment and/or the employment relationship of those in the employ of the respondent and not that they made decisions with respect to policy and the overall operation of the respondent.

4. It was the position of the applicant that these five persons who were classified by the respondent as lead hands were really foremen. In *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121, the Board pointed out some of the problems in applying the principles which have been developed by the Board and also pointed out that each situation has to be determined on the facts before it. At page 1123 the Board stated as follows:

4. The line between "employee" and "management" is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. There is no litmus test which is universally applicable and dictates the result in every situation, and in assessing each case, the Board must have due regard to the nature of the industry, the nature of the particular business, and individual employer's organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or "input" should not be confused with decision-making, and neither technical expertise nor the importance of an employee's function can be automatically equated with managerial status. On the other hand, there may be individuals whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact, the effective decision is made by the challenged individual. It is the type of recommendation which the Board has characterized as an "effective recommendation" and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of interest which section 1(3)(b) was designed to avoid. Persons making "effective recommendations" of this kind are regarded as part of the "management team", and are excluded from the bargaining unit.

5. It was the position of the applicant that unless J. Almeida, F. Cisneros, O. Ford and R. Parrales were found to exercise managerial functions within the meaning of section 1(3)(b) it would mean that Mr. B. Ratzkai, the plant superintendent, would be the first line of supervision for fifty-three employees in the bargaining unit. The applicant argued that the plant superintendent ought not to function as the front line supervision. Mr. Cisneros is the lead hand in the Receiving Department where there are three employees, Ms. Ford is the lead hand in the Mill and Punch Department where there are fifteen employees, Mr. Parrales is the lead hand in the Framing Department where there are seventeen employees and Mr. Almeida is the lead hand in the Assemble & Pack Department where there are eighteen employees. It should also be mentioned that Mr. Martins is the lead hand in the Shipping Department where there are three employees. Mr. Martins reports to the production controller. There is no dispute with respect to the positions of plant superintendent and production controller - both are excluded from the bargaining unit. Although the Board has said in *The Corporation of the City of Thunder Bay*, *supra*, that there must be a rational relationship between the number of superiors and subordinates, the Board has also indicated that there is no magic in the number of employees who are present in a given situation. In this regard, see *Caledon Hydro-Electric Commission*, [1979] OLRB Rep. Oct. 924. See also the remarks of the Board in *Transit Windsor*, [1979] OLRB Rep. Mar. 262.

6. The lead hands do not hire or dismiss employees. They assign work from schedules as opposed to preparing the schedules. They have no input into these weekly schedules and may not amend them. They do not grant leaves of absence and when feasible they obtain permission from superiors before giving an employee permission to take casual time off. They train employees on the equipment the employees are required to operate and they will explain how the work is to be

performed. They perform hands on work when required and will, for example, work on a line when an employee goes to the washroom. Within narrow limits, they may reassign employees to other jobs and other crews upon consultation with the plant superintendent. They do not determine the necessity for performing overtime work. However, they do assign the overtime work to employees in their departments. While they do not prepare written assessments of employees, they are asked and express their views to their superiors on how new employees are performing. Some of the lead hands participate in the suspension of employees and give verbal and written warnings. However, with the exception of Mr. Parrales who will be referred to subsequently, they do this after consulting with their superiors. With the exception of Mr. Parrales, the suspensions and warnings appear to be in reality the decisions of the plant superintendent.

7. The lead hands are hourly rated, receive the same benefits as other employees, are paid the same multiple of the hourly rate for overtime work and in general punch a time clock. They do not have their own offices and are engaged in performing substantial but varying amounts of work which is performed by other employees. They do not participate in regularly scheduled management meetings and have no impact into the overall running of the plant. The applicant made much of the wearing of jackets, the use of a washroom for the lead hands and the allocation of parking spaces. The wearing of different coloured jackets by the plant superintendent, the lead hands and the mechanic appear to be of no more significance than for the purpose of recognition. The so-called washroom for the lead hands is in fact used by other employees. The use of closer and therefore preferred parking spaces by the lead hands and by management appears to have developed among the employees. In our view, no special significance attaches to the occupation of these parking spaces which appears to have developed as a custom.

8. In considering the effective control test in determining whether a person exercises managerial functions, the Board has held that persons will not be determined as exercising managerial functions solely by virtue of the fact that they perform supervisory functions exclusively, unless such persons also have a measure of effective control over the employment relationship. In *Hydro Electric Commission of The Borough of Etobicoke*, [1981] OLRB Rep. Jan. 38, the Board expressed this approach in the following manner at page 46:

25. Exercising supervisory functions does not by itself exclude a person from engaging in collective bargaining. Even when a person is primarily engaged in the supervision of others he is not managerial unless he also has effective control over their employment relationship. (See *Falconbridge Nickle Mines Limited*, [1976] OLRB Rep. Sept. 379 and *McIntyre Porcupine Mines, supra*.) Scheduling work for employees and co-ordinating their efforts (something regularly done by the foremen in this case) is not itself a managerial function. (See, in addition the cases previously cited, *Second Manufacturing*, [1975] OLRB Rep. Sept. 658; *Thames Steel Construction Limited*, [1979] OLRB Rep. May 440 and *Caledon Hydro-Electric Commission*, [1979] OLRB Rep. Oct. 924.)

26. To determine whether the foremen in this case exercise managerial functions within the meaning of section 1(3)(b) of the Act, the Board will look to whether or not they exercise effective control and authority over the people they supervise as may be seen by an ability, at a minimum, to make effective recommendations in areas that materially affect the economic lives of the employees. If they act merely as conduits for management and do not themselves effectively control the economic lives of their employees, they would not be exercising functions with true managerial significance. As well, foremen would not be exercising managerial functions if they merely gather facts relating to their men from which management is then able to make its own decisions as to how to deal with particular situations.

9. The four lead hands other than Mr. Parrales exercise minor supervisory functions over employees within closely defined limits. However, they do not have effective control over the employment relationship of other employees. In matters involving warnings they serve as conduits

for members of management. The Board accordingly, finds that J. Almeida, F. Cisneros, O. Ford and J. Martins do not exercise managerial functions within the meaning of section 1(3)(b) of the Act and they are therefore included in the bargaining unit.

10. The evidence with respect to R. Parrales differs in one important aspect from the other four lead hands. There were important differences in the evidence of Joanne Orsini, a member of the bargaining unit, and Mr. Parrales. In our opinion, on a fair reading of all the evidence Mr. Parrales understated his powers with respect to the disciplining of employees. He has been employed by the respondent for fifteen years and has been a lead hand for almost half of that time. It appears that he possesses additional authority in the field of disciplining employees that the other lead hands do not possess. The Board finds that he has access to employees' files and has disciplined and suspended employees without prior consultation with the plant superintendent or any other member of management. In these circumstances, it appears that Mr. Parrales would be in a position of conflict if he were to be included in the bargaining unit. In addition, Mr. Parrales possesses effective control over the employment relationship of employees in the bargaining unit. Having regard to the foregoing, the Board finds that Mr. Parrales exercises managerial functions within the meaning of section 1(3)(b) of the Act. Accordingly, he is excluded from the bargaining unit.

11. The applicant challenged the timeliness of the objections filed by the respondent with respect to the representation vote. The representation vote had been taken by the Board on July 24, 1987. The last date for filing representations with respect to the representation vote was August 4, 1987. The representations of the objectors in this regard were received by the Board on July 29, 1988, and the representations of the applicant with respect to the representation vote were filed with the Board on September 14, 1987. The respondent informed the Board that Mr. Saxe telephoned the Board on August 4 and received assurances that the respondent would receive an extension of one week for the purpose of filing its representations with respect to the representation vote. It was the position of the applicant that it was an astonishing proposition that a telephone call could secure the extension which the respondent claimed for the purpose of filing representations with respect to the representation vote. The applicant argued that the Board ought not to entertain the representations of the respondent in this regard.

12. After considering the representations of the parties, the Board held that the representations of the respondent were timely because they were filed after the timely representations which had been filed by the objectors. The Board also held, in the alternative, that since there had been no prejudice to the applicant, the Board, pursuant to section 82(2) of the Board's Rules of Procedure, enlarged the time prescribed by the Rules for the filing of representations by the respondent so as to make the filing of the representations of the respondent timely.

13. There were cast in the representation vote held in this matter, two ballots which were ruled by the Returning Officer to be spoiled ballots.

14. The two ballots which were ruled by the Returning Officer to be spoiled ballots are reproduced as Appendix "A" attached. These two ballots have been marked "A" and "B" for ease of reference and will subsequently be referred to by these letters.

15. The parties, while in no dispute as to the principles to be applied in determining whether ballots "A" and "B" are or are not spoiled, differed in their interpretation of the meanings to be given to ballots "A" and "B". It was the position of the applicant that both ballots were properly ruled by the Returning Officer to be spoiled ballots. The respondent and the objectors adopted the position that the two ballots each indicated a wish not to be represented by the applicant. In *National Starch and Chemical Co. (Canada) Ltd.*, [1968] OLRB Rep. June 285, the Board set forth the standard to be applied when it stated at page 286:

6. ...On representation votes conducted by this Board, ballots should be counted where the choice of the voter is clearly indicated on the face of the ballot and the identity of the voter is not disclosed. Where these two tests are satisfied, even though the ballot has not been marked with an "X", there is no reason to discard the ballot as a spoiled ballot.

This decision has been cited with approval and followed on many occasions, see, for example, *Success Display Limited*, [1971] OLRB Rep. Oct. 636; *Lecours Lumber Company Limited*, [1972] OLRB Rep. Nov. 982; *Fruehauf Trailer Company of Canada Limited*, [1974] OLRB Rep. April 254; and *Pachino Construction Company Ltd.*, [1979] OLRB Rep. May 421. The parties agreed with the standard enunciated in *National Starch and Chemical Co. (Canada) Ltd.* but disagreed on the application of the standard to ballots "A" and "B". None of the parties referred the Board to a case which was directly on point with the markings on ballots "A" and "B".

16. The respondent argued that the marking on ballot "A" indicated a clear "no" against the applicant and should not be counted as a spoiled ballot. The respondent also argued that ballot "B" indicated an "X" as the last marking above the other markings. In the alternative, the respondent argued that the marking on ballot "B" in its entirety evinced an intention to answer the question "no" and therefore should be counted as a vote against the applicant. The objectors argued that the markings on both ballots indicated a "no" in each case. Mr. Jamieson, who was a scrutineer at the representation vote, pointed out that many languages were spoken in the respondent's plant and that the ballots were printed in the English language. It was Mr. Jamieson's position that this had contributed to the markings on ballots "A" and "B". The weakness in that argument is that it is not known whether English was or was not the first language of the persons who marked ballots "A" and "B". The applicant argued that the marking on ballot "A" was very equivocal, confusing and very difficult to discern the wish of the voter. In the view of the applicant, ballot "A" was correctly ruled by the Returning Officer to be a spoiled ballot. With respect to ballot "B", the applicant argued that the crossed out "X" clearly lacked an indication of intention. The applicant further argued that it was impossible to discern what had happened with the marking on ballot "B" and that ballot "B" had been properly ruled by the Returning Officer as a spoiled ballot.

17. The parties did not argue the issue of whether or not ballot "A" and ballot "B" had been marked in such a way so as to reveal the identity of the voter. The issue before the Board is whether the choice of the voters who marked ballot "A" and ballot "B" have been clearly indicated. In the case of ballot "A", the respondent relied upon *Fruehauf Trailer Company of Canada Limited, supra*. The facts in that case, which essentially involved the use of check marks and the word "yes" opposite the choice "YES", are not at all similar or equivalent to the facts in the instant case. The markings on ballot "A", in our opinion, make it impossible to determine clearly and unequivocally the intention of the voter. In printing the word "NO" against the choice "YES", the voter has not made it clear whether he or she intended to indicate support for or against the choice represented by the "YES" option. The Board finds and agrees with the ruling of the Returning Officer that ballot "A" is a spoiled ballot and is not to be counted. With respect to the markings on ballot "B", it is not clear whether the voter marked an "X" and then attempted to obliterate it or whether the voter aimlessly marked the ballot and then added an "X". In our view, the intention of the voter is not clearly and unequivocally indicated on ballot "B". Indeed, it may be argued that the voter intended to spoil ballot "B". The Board finds and agrees with the ruling of the Returning Officer that ballot "B" is a spoiled ballot and is not to be counted.

18. In summary and in the light of the foregoing, the Registrar is directed to cause the segregated ballots cast by Juvenile Almeida, Olga Ford, Fulton Cisneros and Jay Martins to be counted in the representation vote. The Board further directs the Registrar to cause the segregated

ballot cast by Richard Parrales not to be counted and to report the tabulation of the ballots cast in the representation vote to the Board.

19. The matter is referred to the Registrar.

APPENDIX "A"

Make an "X" in the circle opposite your choice
IN YOUR EMPLOYMENT RELATIONS WITH
ALUMINART PRODUCTS LTD.

DO YOU WISH TO BE REPRESENTED BY

UNITED STEELWORKERS
OF AMERICA

Yes

No

No

Make an "X" in the circle opposite your choice
IN YOUR EMPLOYMENT RELATIONS WITH
ALUMINART PRODUCTS LTD.

DO YOU WISH TO BE REPRESENTED BY

UNITED STEELWORKERS
OF AMERICA

Yes



No

2359-87-R Local 47 Sheet Metal Workers' International Association, Applicant v. 99538 Canada Inc., carrying on business as **B.C. Meck**, Respondent v. René Piché on his own behalf and on behalf of a group of employees of B.C. Meck, Intervener

Bargaining Unit - Certification - Construction Industry - Petition - Whether two persons falling within unit of journeymen sheet metal workers and registered sheet metal apprentices - Persons were registered in Quebec and had inquired as to how to register in Ontario - Persons excluded from unit - Petition circulated by working foreman not given any weight - Certificates issuing

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

APPEARANCES: *David Jewitt, Bob Belleville* and *Ross Mitchell* for the applicant; *Jacques A. Emond* and *Bernard Carboneau* for the respondent; *Walter T. Langley* and *René Piché* for the intervener.

DECISION OF THE BOARD; June 16, 1988

1. The Board issued a decision dated March 3, 1988, in this application for certification made under the construction industry provisions of the *Labour Relations Act* in which the Board found the following unit of employees of the respondent to constitute a unit of employees appropriate for collective bargaining:

All journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman.

The Board was unable to dispose of the application for certification because of a disagreement of the parties about the persons who were at work in the bargaining unit on the date of making of the application. The employer had filed a list of seven persons, three of whom the applicant claimed were not lawfully at work in the unit described above on the application date and, therefore, should not be included in the unit. They were Gabrielle Brisson, David Lavergne and Ben Marenger. Furthermore, a petition in opposition to the application had been filed with the Board which might be relevant in determining whether the applicant ought to be certified without need of a representation vote.

2. Prior to the application coming back on for hearing before the Board on April 14, 1988, with respect to the remaining issues, the parties agreed that Brisson was a registered sheet metal worker at work in the unit on the date of making of this application. At the hearing on April 14, 1988, the Board found that Lavergne and Marenger were not employees in the bargaining unit. The reasons for the Board's decisions were to be issued in writing at a later date. The Board also received the evidence and representations of the parties respecting the origin and circulation of the petition and reserved its decision as to whether the petition represented the voluntary wishes of the employees who signed it. By decision dated April 22, 1988, for reasons which were to be given later in writing, the Board issued certificates to the applicant pursuant to section 144(2) of the Act.

3. These are the Board's reasons for issuing certificates to the applicant and for its decision given orally in the hearing on April 14th.

4. The question of whether Lavergne and Marenger should be included in or excluded from the bargaining unit described above revolves around whether they are either a journeyman or a registered apprentice in the sheet metal trade within the meaning of the *Apprenticeship and Tradesmen's Qualification Act*, R.S.O. 1980 Chapter 24. The applicant says they are not and should be excluded from the bargaining unit and the respondent takes the position that they satisfy the requirements of that Act. The trade of sheet metal worker has been designated a certified trade (O.R. 298/73) and is a trade for which an apprenticeship training program is established. Therefore, except for certain exemptions not here relevant, it is an offence under section 11 of the *Apprenticeship and Tradesmen's Qualification Act* for any person to be employed in the trade unless the person holds a subsisting certificate of qualification or is an apprentice in the trade. When the Board is faced with this kind of issue in an application for certification under section 144(1) of the *Labour Relations Act* it has found it appropriate to include in a bargaining unit, such as the one described above, only employees who either hold a certificate of qualification in the trade or are apprentices in the trade. In the case of the unit described herein, the Board would include in the unit only employees who are either journeymen sheet metal workers or registered sheet metal apprentices (*Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594).

5. Prior to the date of making of this application, the respondent had written to the Ministry of Skills Development expressing the wish "...to register Mr. Lavergne for his Ontario licence and Mr. Marenger in the Ontario apprenticeship program." and requesting advice "...as to the procedure that we must follow.". Respondent counsel submitted that Lavergne and Marenger were registered in the Province of Quebec as, respectively, a journeyman and an apprentice in the sheet metal trade. The respondent had done everything possible to qualify them under the *Apprenticeship and Tradesmen's Qualification Act* and their subsequent registration under that Act would only be a continuation of the process commenced by the respondent. Therefore, counsel argues that they were properly at work in the bargaining unit on the date of making of this application.

6. There is no evidence before the Board that either Lavergne or Marenger held a subsisting certificate of qualification in the sheet metal trade or was a registered apprentice in the trade within the meaning of the *Apprenticeship and Tradesmen's Qualification Act*, or fell within any of the exceptions in sections 9 and 11 of that Act. Therefore, we have no evidence that they were lawfully engaged in the trade on the date of making of this application. The focus of the Board's concern expressed in *Irvcon Roofing, supra*, and other Board decisions which have followed it, is that persons who are employed in a compulsory certified trade be lawfully so engaged in order to be considered employed in a bargaining unit described in compliance with section 144(1) of the *Labour Relations Act*. Since Lavergne and Marenger were not lawfully so engaged on the date of making of this application, the Board finds that they are not employees in the bargaining unit. It was for these reasons that the Board gave its oral decision at the hearing on June 14, 1988.

7. In the result, the Board finds that there were four persons employed in the bargaining unit described above on November 19, 1987, the date of making of this application. Three of those four employees were members of the applicant, within the meaning of section 1(1)(l) of the Act, as at December 9, 1987, the terminal date of the application. The Board is satisfied, therefore, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 9, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the

Labour Relations Act, to be the time for the purposes of ascertaining membership under section 7(1) of the said Act.

8. As the Board has noted, however, a petition opposing this application has been filed. Two of the three employees who are members of the applicant signed the petition. The petition raises the question of whether, on the terminal date, the applicant continued to enjoy sufficient support amongst its members in order to be certified without the taking of a representation vote. Should the Board find that the petition represents the voluntary wishes of the employees who signed it, the Board would exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote in order to resolve that question. It was for that purpose that the Board inquired into the origin of the petition and the manner in which each signature on it was obtained.

9. René Piché personally prepared the petition and obtained all of the signatures on it. He filed it with the Board through his solicitor, who also filed an intervention. Nothing in the manner in which Piché prepared the petition, obtained the signatures and filed the petition with the Board would cause the Board to conclude that the respondent either knew about or was involved with Piché's activities. Nor is there any evidence from which the Board is prepared to infer that the respondent was involved with the petition. When it comes to assess whether the petition expresses the voluntary wishes of the employees who signed it soon after having applied to be members of the applicant, the Board is concerned, however, about certain statements which Piché made to employees when he approached them to sign the petition. He told them that he knew that the owner of the respondent did not want a union and would "close up shop" if a union came in. Piché also told the employees that he did not want a union either because he thought the owner would close the business, putting him out of work.

10. Although Piché is an employee in the bargaining unit, his remarks are not those of just any other bargaining unit employee. Piché is a working foreman and was the only working foreman with responsibility for the respondent's site employees at the times material to the petition. On the evidence before the Board, he does not exercise managerial functions, but he was responsible for checking the jobs on which the site employees were working and for relaying instructions to them from the two managers to whom he reported. These were Rene Caya, manager of the respondent's operations and Marc Robart, the respondent's senior estimator. They relied on Piché to relay their instructions to the site crews and when Piché did so, he made sure that the employees knew the instructions were from either Caya or Robart and were not his instructions. He also conveyed job-related messages from the site crews to Caya and Robart. Piché was the only person who directly supervised the site crews. Clearly, this gives Piché a different role in the respondent's operations than the other bargaining unit employees and one which would give fellow employees reasonable cause to believe that he was expressing the owner's intentions when he told them that the owner did not want a union and would close up shop if one came in. His role might also give them reasonable cause to be concerned that a refusal to sign the petition might be made known to the respondent and being taken as support for the union, for which they might suffer reprisals.

11. In these circumstances, employees who initially had supported the applicant by signing membership documents are as likely to have signed the petition either out of concern that their job security was at risk if the applicant was certified, or that the respondent would become aware, to their detriment, of their refusal to sign the petition, as to have signed it because they had reassessed the advantages and disadvantages of union representation and they decided against it. Therefore, the Board is not prepared to give the petition any weight in assessing whether, as at the terminal date, the applicant continued to have the support of sufficient employees in the bargaining unit who were its members within the meaning of the Act. The Board instead, will rely on the membership documents filed by the applicant in support of its application.

12. It was on that documentary evidence that the Board made the finding at paragraph 7 that more than fifty-five per cent of the employees in the bargaining unit on the date of making of this application were members of the applicant on the terminal date of this application. Where that finding is made in an application brought under section 144(1) of the Act, section 144(2) requires that the Board "...shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas."

13. It was for all of the foregoing reasons that the Board's decision dated April 22, 1988 directed the issuing of the following certificates:

- (1) a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the Sheet Metal Workers' International Association and The Ontario Sheet Metal Workers' Conference consisting of Locals 30, 47, 235, 392, 397, 473, 504, 537, 539, 562 and 629 of the Sheet Metal Workers' International Association in respect of all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.
- (2) a certificate will issue to the applicant trade union in respect of all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

2275-87-U Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Complainant v. **Barouh Eaton (Canada) Ltd.** and Ron Gibbons, Respondents

Duty to Bargain in Good Faith - Interference in Trade Unions - Strike - Unfair Labour Practice - Letter sent by employer to employees setting out offer made to union during negotiations proper exercise of employer free speech - Second letter sent to most senior employees inviting contact with employer personally breach of bargaining duty and interference with union - Closure of part of business not motivated by anti-union considerations

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *G. O. Shamanski* and *J. Sarra*.

APPEARANCES: *Frank Luce* and *Sam Schouten* for the complainant; *C. E. Humphrey*, *R. Gibbons* and *S. Chester* for the respondents.

DECISION OF K. G. O'NEIL AND J. SARRA; June 6, 1988, as amended June 20, 1988

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant (also referred to in this decision as the "union") alleges that the respondent (also referred to in this decision as the "company") dealt with it and certain of its members contrary to sections 3, 15, 64, 66, 67, 70, 71(a) and 73 of the *Labour Relations Act*.

2. The company is a distributor and, prior to the events related below, was also a manufacturer of various kinds of office products, predominantly ribbons for use in typewriters, calculators and other types of printers. The respondent Ron Gibbons is its Operations Manager. The substance of the complaint relates to events surrounding bargaining and a strike for a second collective agreement.

3. The parties entered into a first collective agreement which expired on July 29, 1987. Bargaining for the second collective agreement commenced on July 3, 1987. An application for conciliation was filed after that meeting. A meeting with the parties and a conciliation officer was held on August 21, 1987. A "no board" report issued on or about September 1, 1987. On September 18, 1987 the parties met with a mediator.

4. An agreement not having been reached, the union conducted a strike vote on September 25, 1987 and a legal strike commenced October 5, 1987. Unsuccessful mediation took place on November 9, 1987 and the strike was still in progress as of the date of hearing of this complaint.

5. The first of the actions complained of by the union involves a letter in the following form which was sent by the company to each of the employees in the bargaining unit covered by the expired collective agreement (approximately sixty-five to seventy people) on September 18th:

The company and the union have been trying to make an agreement. The company and the union met on September 18. They did not make an agreement. The company did make a final offer to the union. We think the offer is fair. The offer is all the company can afford. The union is going to hold a meeting to vote on the company's offer. You should go to the meeting to vote. We hope you will vote to accept the offer.

If the offer is accepted your hourly rate will be \$7.425 effective July 30, 1987.

In the second year of the agreement your wage will be \$7.775 per hour.

In the third year of the agreement your wage will be \$8.125 per hour.

We have offered as much as we can. Please attend the union meeting and vote for the offer.

These letters were translated into a Filipino dialect and Punjabi for workers with those first languages.

6. The next activities complained of consist of the sending of two sets of letters on November 10, 1987, the day after the unsuccessful mediation. The sixteen most senior employees received the following letter:

As you may know the company and the union met on November 9, 1987. The meeting was with a mediator from the Ontario Ministry of Labour. The meeting was called to try and make an agreement. Unfortunately no agreement was reached.

At the meeting the company told the union some things we think you should know. As a result of the strike the company has lost business. We have had to review our business. We have realized that no matter what happens we have to change our business. Part of this change will mean

that we do not need as many employees as in the past. We believe we will only need about 16 employees.

Based on your length of service you are among the 16 employees we feel we can continue to employ. We are prepared to have you return to work immediately and will immediately increase your pay by 35¢ per hour. If you wish to return to work immediately please contact me.

We still hope that we can reach a settlement with the union so that employees like yourself can return to work under a new contract. However, even if an agreement cannot be reached with the union at this time you have the right to return to work whenever you wish.

The remainder of the bargaining unit received a letter which was identical up to and including the sentence, "Part of this change will mean that we do not need as many employees as in the past." In addition, this letter ended with the following two paragraphs:

We think that it is fair that we advise you that because of our reduced need for employees we will be terminating your employment effective November 11, 1987. If we later find we need more employees or some of those retained quit, then we will offer you re-employment based on your length of service, i.e. longer service employees first.

We regret that we are forced to make this decision but feel we have no choice. We believe it is fair you know we will be unable to re-employ you so you can make plans for your future.

These letters were all in English and were handed to people who were on the picket line or mailed to those who were not.

7. Further, the union complains that in January 1988 the employer advertised in the following format:

OPENINGS

in Light Assembly

Full time and part time. Positions ideal for students, housewives, anyone entering the work force for the first time or just returning to work. Positions also ideal for anyone who is looking to supplement the family income, including retired or semi-retired people. Knowledge of English is not required. No experience necessary. Hourly salary. Call:

678-1800

8. The union takes the position that the onus on the employer to justify its conduct pursuant to section 89(5) was not satisfied and that the conduct set out above amounts to a series of unfair labour practices. The company takes the position that the notices complained of were truthful and were to allow employees to come to a decision about what they should do. It maintains that it would have been improper not to inform the employees of the matters contained in those notices and that the discontinuation of the manufacturing operation was for valid business reasons.

9. The company called its Operations Manager, Ron Gibbons, to explain the actions complained of by the union. Mr. Gibbons explained that originally the company had been a distributor only. It had gradually gotten into manufacturing approximately fifty per cent of the units that it sold. He said that as the years went by the manufacturing equipment used was becoming more and more outdated.

10. The bargaining unit covered by the expired collective agreement in this case had originally consisted of a hundred and twenty employees. This number was declining due to a high turnover and the fact that it was, in the words of Mr. Gibbons, "quite impossible to hire people at the labour rate we could afford". The number of employees in the bargaining unit immediately prior to the strike had been sixty-five to seventy people, depending on whether certain people on leave were included. All but six or seven of the employees, who were involved in shipping, were involved directly in the manufacturing process. The process was "labour intensive", using no automated or semi-automated equipment in the plant.

11. The letter sent in September was sent to each individual employee with the wage rate that they would be making in the various years of the anticipated collective agreement, based on the increases that the company had offered to the union, being increases of .35 an hour for workers whose previous wage had been at the minimum wage and .40 an hour for those whose previous wage had been above the minimum wage in each of three years.

12. The company has not manufactured since the strike began. It has carried on business as a distributor. It has been obtaining product to distribute from both pre-existing sources and new ones that have been discovered since the beginning of the strike.

13. At the mediation meeting on November 9, 1987, which was the first meeting between the parties since the beginning of the strike, the company representatives informed the union that the operation was to be restructured due to a considerable loss in volume of sales. They informed the union that they had decided to operate only as a distributor because the costs of manufacturing with their antiquated equipment were too high. They told the union that they were able to employ fifteen or sixteen people to work in the warehouse, boxing and packaging the products that they would distribute. The company offered to apply its last offer, the one on which the September letters was based, to the sixteen employees returning and to give others a right of recall for three months. Recall would be according to seniority. The parties were not able to reach an agreement on that proposal.

14. Shortly after the strike it had become apparent to members of management that they could buy the product from suppliers more cheaply than the company could manufacture it. Although they were aware of this in a general way before the strike, they were not fully aware of the extent to which it was true until they were forced to find out because they were not able to manufacture the product during the strike.

15. The offer of employment to sixteen individuals was based on an assessment of the number of people the company would require to bring in the product, repackage it, check it off and put on the local product identification. Mr. Gibbons testified that the reason the employees were sent letters was that management felt that the workers should know what the circumstances were. A direct letter would advise them, rather than "leaving them to walk the picket line not knowing". As to the sixteen, they wanted them to be back at work in the warehouse. The letters had virtually no impact; no one returned to work as a result. The thirty-five cent an hour increase was a reference to the last offer made to the union.

16. Prior to sending the letter, Mr. Gibbons had made inquiries of the Unemployment Insurance Commission. He had been advised that the employees would be eligible for unemployment insurance benefits if they were dismissed rather than left on strike. He sent separation certificates, on which he indicated that the reason for termination was restructuring of the company.

17. Since advising the union on November 9th of its intent to discontinue manufacturing, the company has shipped sixty per cent of its manufacturing equipment to the United States for

sale. The older equipment has been disconnected. Some of it will be disposed of as waste metal. Part of the plant has been leased as a warehouse to a company that prints forms and was in need of storage space. Management intends to lease more of the plant for warehouse space as that tenant requires it. The company is using the remainder of the plant as a warehouse for its own product.

18. As to the allegations about the advertising in January, Mr. Gibbons testified that the company advertised in Brampton, in Mississauga, at Manpower, and in Filipino, Italian, Spanish and Portuguese newspapers. It was advertising to fill the positions that had been offered to, and not taken up by, the sixteen workers with the highest seniority in the plant. Mr. Gibbons said that the reason the company advertised in January rather than offering to rehire the people who had been terminated was that they had already been told the company would take them back if they wanted to cross the line. Mr. Gibbons made this clear to various employees who approached him in person or by phone and told him that they wanted to return to work but that the union had warned them not to return to work. He said he did not approach individual employees. None of the employees actually asked to come back to work.

19. Mr. Gibbons testified that there had been a gradually deteriorating situation shown in the company's financial statements for months leading up to the strike. Faced with the loss of business during the strike, he said that the company had to do something different in order to survive. Management made the decision to restructure about one week before the mediation meeting, on approximately November 3rd, at a management meeting attended by the president, the purchasing agent, and the operations manager, with input from the accountant.

20. The company is owned by a New York parent. The Canadian managerial group made a recommendation to New York to restructure in the manner described above and the New York parent accepted that recommendation and made the final decision that the restructuring would take place. Mr. Gibbons described the decision as inevitable. When asked if the restructuring would have happened whether the strike had taken place or not, he replied that he had not been aware of all the information prior to the strike. The inevitability only became apparent during the strike. With the company's inability to supply itself, it did not take long to establish the facts and form the conclusion that a restructuring was necessary. Between October 5th and November 3rd, the company obtained new suppliers from Ireland, Puerto Rico, Korea and Japan, as well as additional U.S. sources for the product, all of which could supply product at a price lower than the cost at which the company could manufacture it at the Mississauga plant in question.

21. Mr. Gibbons testified that the strike had no real bearing on the decision to restructure in the sense that the decision would have had to be made anyway. The only context in which they discussed the strike when they were making the decision to restructure was that they could not service the market from their own supply because of the strike. The business further deteriorated after the thirty per cent decline that had happened between October 5th and November 3rd. Mr. Gibbons said that although the company could have stayed in the manufacturing business if it had signed the old collective agreement he did not think that it would have remained in business for long.

22. Prior to the beginning of the strike, the company had advertised space for lease in the plant and had entertained inquiries about it. Given that negotiations were not going well, the company wanted access to potential tenants if needed, but since they did not know what the outcome of negotiations would be, nothing had been arranged. The union's complaint does not put this action in issue, although it was dealt with in Mr. Gibbons' evidence.

23. Mr. Schouten, the union's business agent, outlined the sequence of events leading up to the strike. He confirmed that the company had told the union on November 9th that they were

scaling down to sixteen people because they could not compete on account of their obsolete machinery and a "multitude of company reasons". The union responded that if the company was only going to have sixteen to eighteen people return that it should offer the workers a dollar an hour more over each of the three years in the contemplated three-year term, and recall rights for the others for twenty-four months, together with improvements on language issues. This was not accepted by the company. Mr. Schouten testified that he did not believe the company's reasons for scaling down. No evidence other than Mr. Schouten's was presented by the union.

24. We will take each of the union's complaints in order. Firstly, the union complains of a violation of section 3 which provides that "every person is free to join a trade union of his own choice and to participate in its lawful activities". This was not specifically pursued in argument.

25. The union alleges failure to bargain in good faith because the company communicated individually with employees during the course of bargaining in the manner set out above. This goes hand in hand with the union's allegation that the company breached section 67 by bargaining with a person other than the trade union. The issue in this regard is whether communications with the individual employees constituted an attempt to bargain directly with the employees. See, for example, *A. N. Shaw Restoration Limited*, [1978] OLRB Rep. May 393.

26. Starting with the September 18 letters, the Board does not find them to violate the duty to bargain in good faith, or the duty to bargain only with the certified bargaining agent, although the advice about how to vote is close to the line. The letters make no offer to bargain. Moreover, they refer the individual employees to the process of voting conducted by their union and expressly note that the company made the offer to the union. In determining whether or not an employer's communications to its employees can legitimately be characterized as an attempt to bargain directly with them, the Board examines not only the nature of the particular communications complained of, but also the particular bargaining context in which those communications occur. Of particular importance is the timing of the communications, i.e. whether they occur early in the negotiations or late: *The Citizen*, [1979] OLRB Rep. March 177. In that case, the employer had engaged in much more extensive and explicit communication with individual employees than took place in the instant case. The Board found in the circumstances of that case and in light of the history of bargaining between the parties, that those communications did not amount to bargaining directly with employees and were not violations of either the duty to bargain in good faith or the exclusivity of the bargaining agent. This was because they were in the nature of an explanation of the employer's position, did not disparage the union's proposals or its bargaining committee, and fell within the protection afforded to employers under what was then section 56 (now section 64). Similarly, we are of the view that the facts before us do not establish that the company violated section 15 or section 67 by issuing the September 18 letters. They explained the employer's offer and urged acceptance at a late stage in bargaining, when the parties were at impasse.

27. By the time of the November letters, the bargaining context had changed considerably. The members of the bargaining unit had voted to strike rather than accept the employer's last offer, and had been on strike for five weeks. The situation was considerably more delicate than in September. Although in some respects the letters are similar to those of September in that they are truthful and restate the employer's last offer, and express a preference for a contract, there are additional elements in the November letters which lead us to the conclusion that the November letters cross the line of acceptable employer communication, and constitute violations of sections 15 and 67. Attempts by employers to directly negotiate with employees violate not only section 67 but also the duty to bargain in good faith where the employer's activity works to undermine the viability of the bargaining agent. The Board has said in *Globe Spring and Cushion*, *supra*:

A very important function of the bargaining duty contained in that provision [section 15] is reinforcement of an employer's obligation to recognize a trade union selected by employees as their bargaining agent. Attempts by an employer to bargain directly with his employees undermine that obligation and, therefore are antithetical to good faith collective bargaining and the duty to make every reasonable effort to make a collective agreement.

Although the terms and conditions of employment were not offered for discussion with individual employees as in *Rexwood Products Limited*, [1987] OLRB Rep. Feb. 267 or *Globe Spring and Cushion*, [1982] OLRB Rep. Sept. 1303, the invitation in the letters to the more senior employees to contact the employer personally circumvents the union and is an attempt to elicit an individual response from the employees to the employer's last proposal. The employer already knew the collective response to the proposal by way of the strike vote and the mediation meeting the day before. We are of the view that the November letters constitute an attempt to deal directly with individual employees rather than the union on an issue central to the bargaining dispute, i.e. at what wage the workers would return. When seen in the context of the announcement of the serious curtailment of the employer's business and the discharge of a majority of the bargaining unit the communication is not protected by section 64. The bargaining context was no longer remotely similar to that in which the Board allowed the more extensive communication in the *Ottawa Citizen*, *supra*.

28. The facts which establish the violations found above also establish a violation of section 64, in this case, in that the November letters circumvented the union in its representation of its members. This interferes with its ability to represent its members in a collective way at the bargaining table by undermining its authority as the exclusive bargaining agent.

29. The union also alleges violations of sections 66 and 70 are established on the facts of the letters, the discharges and the advertising for replacement workers in January, 1988. It is important at this juncture to note the effect of section 77 of the Act which permits the discontinuance for cause of the employer's manufacturing operation. As discussed in *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577, the cause referred to in this section is cause free from anti-union animus. Where such cause exists, even in the midst of a strike, the closure will be permitted. See *Webster and Horsfall*, [1969] OLRB Rep. Sept. 780 and *Academy of Medicine*, [1977] OLRB Rep. Dec. 783. On the other hand, however, the termination of a substantial part of a bargaining unit during a lawful strike is an extraordinary action, which, in the absence of a clear and convincing explanation, may well constitute a serious unfair labour practice.

30. Where anti-union animus is alleged, it is now well settled that the employer is required to establish that the reasons given for the action complained of are the only ones and that they are not tainted by anti-union animus. (*Barrie Examiner*, [1975] OLRB Rep. Oct. 745). Much has been said in the Board's jurisprudence about the necessity of determining the issue of animus by means of inference and in light of the "reverse onus" imposed by section 89(5) of the Act where there is no admission or incriminating evidence from the respondent. As pointed out in *A.A.S. Telecommunications*, [1976] OLRB Rep. Dec. 751, paragraph 14:

14. The existence of the reverse burden of proof, however, does not mean that the determination of employer motive has now become an easy task for the Board. The Board is still faced with the problem of assessing the evidence presented to it and drawing inferences from that evidence. There are many cases in which employers come forward with plausible explanations of their conduct from which it can be inferred that an employer's conduct is not in contravention of the Act. As a tactical matter, in these cases the complainant must introduce evidence to rebut that inference since, in the absence of any evidence from the complainant, the Board would con-

clude that the employer has met the burden imposed on it by section 79(4a). The result is that, in most cases, the Board has presented to it evidence from both the employer and the complainant. This evidence must then be assessed and inferences must be drawn. Such factors as the existence of a pattern of anti-union activity on the part of the employer, the employer's knowledge of the existence of union activity and of the employee's involvement in that activity, the manner in which the employee was discharged, and the credibility of the witnesses must all be considered. The Board's responsibility to assess the evidence, therefore, is one that cannot be avoided by seeking refuge in the reverse burden.

In the present case, the employer offered a plausible explanation of its action in closing its manufacturing section. Cross-examination of Mr. Gibbons' evidence left the employer's explanation intact. The union called no evidence which cast doubt on the explanation. The only evidence that even tended in that direction was the business agent's statement that he did not believe the employer's reasons for shutting down.

31. There is no evidence before us of any mistake or inaccuracy or lack of frankness with the Board on the part of the company as to the economic, business-related reasons for the closure of the manufacturing portion of the business. The fact that it had at one time been just a distributor and was reverting to that state, lends some credence to its position. So does the fact that the company offered to re-employ members of the bargaining unit and made an offer that it was willing to incorporate into a collective agreement that would cover those individuals. There was no allegation that the nature of the offer was a failure to bargain in good faith or an unfair labour practice in itself. It is clear from the evidence that union activities were not taken into account in selecting who was to be retained and who was to be let go. Indeed, there was no attempt by the union to disprove the evidence of the employer that the decision to keep the sixteen was made on *bona fide* business grounds and that the selection of who would fill the positions was made on the basis of seniority. We are left with no evidence to found the inference of the existence of anti-union animus in the discontinuance of the manufacturing operations urged on us by the union.

32. The timing of the discharges immediately after mediation is a factor which lends force to the union's allegations. However, there is nothing in the evidence that dislodges the testimony of Mr. Gibbons that the decision had been taken before that time. In these circumstances, timing does not justify an inference contrary to the credible and basically unchallenged evidence of the employer that the change was motivated solely by *bona fide* business reasons.

33. It was argued that if the employer was not engaged in activity tainted by anti-union animus, it should have offered the jobs in succession to the remainder of the bargaining unit when the sixteen original people did not take up the work rather than advertise for new workers, or that it should merely have laid the employees off without termination of their employment status. The difference between discharge and lay-off under the first collective agreement between the parties was that the collective agreement gave an employee the right, on increase or decrease of the work force, for six months after lay-off, to have seniority determine recall if "skill, competence, efficiency and qualifications [were] equal in the Company's discretion". The employer explains the discharges as the implementation of the decision to close the manufacturing operation which it intended to be permanent. The union takes the position that this amounts to "no answer" to the question as to why it was necessary to discharge rather than lay off. We are not persuaded that these facts support the inference that there was anti-union animus in the face of the company's offer to apply an amended collective agreement to any returning employee and the offer in the letters of discharge to re-employ if the need arose in the future.

34. Nor are we persuaded that the January advertisement itself represents a violation of the Act. It is not illegal to advertise for replacement workers. Although the union doubted that the employer was advertising just the non-manufacturing jobs, it brought no evidence to this effect and

thus we have no reason to disregard Mr. Gibbons' evidence on the point. Between the time of the November letters and the January advertisement, the union had complained that individually offering its striking members work was a violation of the Act. We cannot give effect to the argument that three months later, *not* doing that is an unfair labour practice. The union evidently originally also had in mind an allegation that the advertisement, by not advertising in the Punjabi newspapers, had discriminated against certain Punjabi union members. However, this was not set out or particularized in the complaint. The Board declined, pursuant to Rule 72 of the Rules of Procedure, to hear evidence on that allegation. No request to amend the complaint or particulars was made. The Board is left with no allegation of misconduct against the Punjabi group before it, as we held orally at the hearing when the employer objected to the introduction of such evidence in the absence of reference to the allegation in the complaint or particulars.

35. The remaining allegations under sections 71(a) and 73 are not necessary to deal with as there was no additional activity complained of to ground these portions of the complaint and they were not pursued in argument.

36. The complaint is allowed in reference to the November letters, but is dismissed in all other respects. To remedy the contravention found above, the Board, pursuant to section 89(4) of the Act, hereby directs that the respondent:

- 1) cease attempting to bargain with individual employees and meet with the union and negotiate in good faith on all outstanding issues;
- 2) refrain from any future interference with the trade union's right to represent its members; and
- 3) cause copies of the attached notice marked "Appendix" as supplied by the Board to be signed by its president and posted in a conspicuous place on the premises where the remaining jobs are being performed where they are likely to come to the attention of bargaining unit employees and keep such notices posted for sixty working days and take all reasonable steps to ensure that the notice is not altered or defaced or covered by other material;
- 4) notify all persons who were members of the bargaining unit on November 9, 1987 of the outcome of this decision by mailing a copy of the attached notice, after being signed by the President, to each of them, and forthwith provide the union with a list of the names and addresses of all of the employees to whom it has been sent within three weeks of this decision. Such notification is to be translated in the same manner as the September 18 letters sent by the company to the employees.

37. The Board remains seized to resolve any dispute regarding the implementation of the Board's directions.

DECISION OF BOARD MEMBER G. O. SHAMANSKI; June 6, 1988

1. I dissent.

2. The complainant alleges in this case that the respondent contravened sections 3, 15, 64, 66, 70, 71(a) and 73 of the *Labour Relations Act*.

3. Having heard the evidence adduced at this hearing by the parties, I am totally persuaded that:

- i) The company did not interfere with employees' rights to join a union re: section 3.
- ii) The parties had bargained for a new collective agreement and had gone through the mechanics of conciliation and mediation and had fully complied with section 15 of the Act.
- iii) The company did not interfere with the union and complied with the provision of section 64 of the Act.
- iv) There was no interference by the company with respect to the employees' rights. The company did not contravene any part of section 66.
- v) The company did not lock out its employees. The union and its members rejected the terms for a new collective agreement and voted to strike.
- vi) There was no evidence put forth by the union that would in any way substantiate a violation of section 71(a).
- vii) During the strike the company changed its operation and went out of the manufacturing business and became a distribution centre.

4. Prior to implementing this major change the company advised the union and its striking members of the change and the reasons for such change. The company further advised the union and its members of the ramifications which would flow from the change of operation.

5. The union's evidence substantiates the business agent W. Schuton did not believe the company was scaling down its work force. This being so it was obvious that the union would not convey this not so pleasant news of reality to its members.

6. In conclusion, I must highlight the fact that the company did negotiate with the union in good faith and tried in vain to consummate a settlement that they could live with.

7. Under section 64 of the Act an employer is afforded certain rights, i.e. to communicate its views, so long as it does not use coercion, intimidation, threats, promises of undue influence to employees.

8. There was no evidence presented that would substantiate that the company did use coercion, intimidation, threats, promises of undue influence.

9. The two newsletters to employees were in my opinion a legitimate method to communicate with its employees and convey to them an accurate unadulterated realistic scenario of the company's stay alive positive and how some of them would fit into this scenario.

10. I would have therefore dismissed the union's complaint with respect to this matter.

Appendix
Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING ARISING OUT OF THE BARGAINING BETWEEN US AND THE UNION FOR A SECOND COLLECTIVE AGREEMENT. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY GOING AROUND THE UNION AND SENDING THE LETTERS WE SENT ON NOVEMBER 10, 1987.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS;

WE WILL MEET WITH AND BARGAIN WITH THEM IN GOOD FAITH ON ALL OUTSTANDING ISSUES;

WE WILL MAIL AT OUR OWN EXPENSE A COPY OF THIS NOTICE TO THE RESIDENCE OF EACH BARGAINING UNIT EMPLOYEE EMPLOYED BY US ON NOVEMBER 9, 1987 AND WILL PROVIDE THE UNION WITH A LIST OF THE NAMES AND ADDRESSES OF ALL OF THE EMPLOYEES TO WHOM THAT MATERIAL HAS BEEN SENT WITHIN THREE WEEKS OF THE DATE OF THE DECISION.

BAROUH EATON (CANADA) LTD.

PER: _____
PRESIDENT

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 6TH day of JUNE 1988

1931-87-U Local 27, United Brotherhood of Carpenters and Joiners of America, Complainant v. Local 183, Labourers International Union of North America, **Bay-Tower Homes Company Ltd.**, Bay-Tower Management Inc., Ledi Properties Inc., 518270 Ontario Limited, 554614 Ontario Limited, Respondents

Practice and Procedure - Reconsideration - Request for reconsideration to the extent of providing reasons for rulings made during the hearing - Rulings not recorded or discussed in the written decision - Request for written reasons denied

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *C. A. Ballantine* and *J. A. Rundle*.

DECISION OF THE BOARD; June 1, 1988

1. This is a request for reconsideration of the decision of March 28, 1988. Counsel for the complainant asks that the Board reconsider to the extent of providing reasons for rulings made during the hearing, rulings which are not recorded or discussed in the written decision.

2. Regardless of whether the Board is obliged to provide written reasons for oral rulings given with reasons during the hearing, neither ruling had any bearing on the final decision. Counsel for the complainant sought to pursue both matters, one in evidence and one in submissions, on the basis they were relevant to the issue of whether Local 183 had breached the *Labour Relations Act*, as asserted by the complainant. Although we ruled against the complainant in both cases, precluding counsel from pursuing further these matters, we ultimately found in counsel's favour in this respect, finding that Local 183 had breached the Act. Neither ruling therefore, had any effect on the decision we reached or the reasons for reaching that decision. In these circumstances, it would serve no purpose to provide written reasons.

3. This request is accordingly denied.

2033-87-G United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Applicant v. **The Board of Governors of Exhibition Place**, Respondent v. Labourers International Union of North America, Local 183, Intervener

Parties - Sector Determination - Whether persons having status to participate in a sectoral determination hearing - Person must have a direct connection with the project - Union entitled to intervene

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballantine*.

APPEARANCES: *Donald W. Wilson, Bill Weatherup, Jack Quinlan and Wayne Trahan* for the applicant; *Paul Young, Keith Baxter and Ted Ballinger* for the respondent; *S.B.D. Wahl and A. Dionysio* for the intervener.

DECISION OF THE BOARD; June 21, 1988

1. The Board made the following oral ruling at its hearing in this matter on June 20, 1988, after hearing from counsel for the applicant and without calling upon counsel for the respondent or counsel for the intervener to reply:

This is a referral of a grievance to arbitration in which the Board, differently constituted, by decision dated January 21, 1988 recorded that the respondent sought a determination under section 150 of the *Labour Relations Act* as to whether the work that is the subject of this grievance was within the industrial, commercial and institutional sector of the construction industry. The Board also noted:

“The applicant has asked that the Board schedule the matter for hearing having regard to the position of the respondent.”

In the view of the parties’ position, the Board authorized a Labour Relations Officer “... to prepare a list of the persons who are, in the view of the applicant and the respondent, to receive notice of this application under section 150 of the Act.”

Such a list was prepared. The respondent took the position that the Ontario Sewer and Watermain Contractors Association; Labourers International Union of North America, Local 183; and Kenneth Siddall Inc. ought to be given notice and be entitled to participate in these proceedings. The applicant takes the position that those three entities are not entitled to participate.

The work which is the subject of this grievance arose on an irrigation project by which the respondent is drawing water from Lake Ontario to irrigate its grounds. The respondent indicated that there are three phases to the irrigation project. The first phase is now completed. The second and third phases will be subject to separate tenders. Counsel for the respondent indicated that the same issue with respect to the work which is the subject of this dispute will arise in the second and third phases of the irrigation project. *Harbridge & Cross Ltd.*, [1979] OLRB Rep. April 313 sets out the criteria for a party having status to participate in a proceeding under section 150 of the Act. The Board wrote at paragraphs 8 and 9, page 314:

“Section 135 [now section 150] clearly indicates who may make an application and refers to ‘work performed or to be performed by employees’. It appears to the Board that the project with respect to which any question arises either with reference to present or future work must form the point of departure in determining which persons have status to participate in a proceeding under section 135.”

In our view, in order for a person to have standing to participate in a proceeding under section 135 such a person is required to have a direct connection with the project wherein the question arises or will arise. A direct connection is possessed by a person who employs employees who are working or who will work on the project; trade unions or councils of trade unions which have bargaining rights for employees who are working or who will work on the project; and employer bargaining agencies, employee bargaining agencies and affiliated bargaining agents which represent the employers, trade unions or employees previously referred to in this paragraph.”

In this case it is clear that the Labourers International Union of North America, Local 183 represented the employees who did the work which is the sub-

ject of this grievance. Kenneth Siddall Inc. was their employer. Since the irrigation project will continue in the future, and the same sector issue will arise, we believe it appropriate to allow Local 183 to participate in these proceedings since it represented the employees who did the work in the first phase, and, depending on the assignment of the work by the respondent in the second and third phases of the project, may represent the employees who do the work on the project during those phases.

Kenneth Siddall Inc. and the Ontario Sewer and Watermain Contractors Association received notice of this proceeding and did not appear. Under these circumstances, it is not necessary for the Board to determine their entitlement to participate as parties since they have not come forward to express any interest or participate.

The Board hereby rules that Labourers International Union of North America, Local 183 has status to intervene in this matter.

2. This matter is referred to the Registrar to be scheduled for hearing.
3. This panel of the Board is not seized with this matter.

0830-87-R John Campbell, Applicant v. International Brotherhood of Electrical Workers Local 1590, Respondent v. Cable Tech Co. Ltd., Intervener

Representation Vote - Termination - Three employees relying on information contained in a letter from their employer as to when they could vote - Employees missing opportunity to vote - Objections to vote dismissed - Employees who ignore the Board's official notices do so at their own peril

BEFORE: *Nimal V. Dissanayake*, Vice-Chair, and Board Members *G. O. Shamanski* and *J. Redshaw*.

APPEARANCES: *Michael G. Horan* and *John Campbell* for the applicant; *Bernard Fishbein* and *R. Conrad* for the respondent; *Joseph Neil Tascona* and *Craig Thomson* for the intervener; *Douglas H. Brown* for the objecting employees.

DECISION OF THE BOARD; June 30, 1988

1. This application for declaration terminating bargaining rights of the respondent trade union was filed on June 19, 1987. A hearing into the application was held on August 11, September 9 and October 2, 1987. By majority decision dated December 14, 1987, the Board directed that a representation vote be conducted among the employees in the bargaining unit.
2. On January 8, 1988 an officer of the Board met with the parties to make voting arrangements. It was agreed that the vote will be conducted on January 26, 1988. As is the usual practice an alternate date of January 28, 1988 was also agreed upon in the event that the vote is for some reason not held on January 26th. There is no question that all of the parties agreed and understood

that the only date on which the vote would be held was the 26th and that the 28th was only an alternate date agreed to as a precautionary measure.

3. In accordance with the Board's Rules, the Board forwarded to the employer five copies of "Form 69 Notice of Taking of Vote" and five copies of the voters' list with directions that these "are to be posted immediately by the employer in such conspicuous locations that they may be seen and read by all eligible voters."

4. The vote was conducted on January 26th as scheduled and all of the parties signed the consent and waiver form agreeing to an immediate counting of the ballots. Out of 134 eligible ballots cast 68 were in favour of the respondent union and 66 against.

5. By letter dated February 2, 1988 three employees Don McQueston, Dave Sear and Andy Gibbons objected to the vote on the basis that they had not been given a reasonable opportunity to vote. A hearing was convened by the Board on May 5, 1988, to deal with this issue.

6. The facts underlying the employees objection were not in dispute and were presented to the Board without the need for calling evidence. The facts that were presented are as follows.

7. The three objecting employees constituted what is known as "the continental shift". The duration of the polls conducted on January 26, 1988 did not overlap with this continental shift. Thus the three were not at work at any time when the polls were open. On January 20, 1988, the employer posted the five notices (Form 69) as instructed by the Board. Each Board notice is approximately 14 inches x 54 inches in size and in bold 1 1/2 inch letters is a heading "**NOTICE OF TAKING OF VOTE**". There is a sub-heading in bold "**TIME AND PLACE OF TAKING OF VOTE**", followed by a preamble which states "Voters may cast ballots at their proper polling place at any time during the period in which voting is to take place. The vote will be taken at the following time and place:". Following the preamble there appear three headings "Date", "hours", and "place". Adjacent to the title "Date", there appears "Tuesday, January 26, 1988.

8. The objecting employees were at work at various times between January 20, when the notices were posted by the employer, and January 26, the date the vote was taken. There is no suggestion that there was anything that prevented them from reading these notices. Indeed they admit that they saw the notices and may even have read parts of it. Yet they claim that they did not pay attention to the Board notices because they relied on a letter that they had received from the employer.

9. This letter dated January 11, 1988 and signed by the company's President was sent to all of the employees in the bargaining unit. It is not necessary to reproduce the two page letter in whole here. Suffice it to say that it urged employees to give the company a chance to work without a union. The relevant part of the letter for purposes of this proceeding reads as follows:

Dear Fellow Employee:

As a result of a January 8 meeting at the Department of Labour, the following arrangements were agreed upon for the secret ballot vote to decide whether or not you wish to continue being represented by Local 1590 of the I.B.E.W.

Date of Vote - Tuesday, January 26, 1988

Alternate Date - Thursday, January 28, 1988

Voting Times - Day Shift 9 A.M. - 10 A.M.

- Afternoon Shift 5 P.M. - 6 P.M.

- Night Shift 7 A.M. - 8 A.M.

Those persons whose day off occurs on the day of the vote have the right to come in and vote at any of the above times regardless of the shift upon which they are normally scheduled to work.

Place where Polling

Booth to be Located - New Lunchroom

10. The objecting employees claim that upon reading the above, they understood that they will have an opportunity to vote on either January 26 or January 28 and that since they were not scheduled to work on the 26th they had planned to vote on the 28th. To their surprise, they learned that the vote had been concluded on the 26th. They claim the employer's letter was misleading as to the date of the vote and that as a result they were denied of their right to participate in the vote.

11. After hearing submissions from all of the parties and the counsel for the three objecting employees, the Board recessed to consider the same. Upon returning, the Board delivered the following oral ruling dismissing the objections to the vote and the request for a new vote:

"The Board has considered the submissions of counsel in light of the facts presented. Having done so, the Board has come to the conclusion that there is no reason for interfering with the result of the vote. The facts indicate that five copies of the Board Notice, Form 69 - Notice of Taking of Vote, were posted by the employer as required by the Board's Rules. The notices very clearly set out the date, time and location of the vote. There is no suggestion that any of the objecting employees had no opportunity to read and understand the contents of these notice. However, they chose to ignore the Board's official notices and to rely instead on information contained in a letter from their employer. Any employee who elects not to pay attention to the Board's official notice, as the objecting employees claim they did, does so at his or her own peril. It is not too much to ask of employees to do this simple task. An employee has an obligation to read the Board's official notice. If any other information he or she has with respect to the vote is in conflict with the information contained in the Board's notice, he or she has an obligation at least to seek some clarification. The employees here, by ignoring the Board's notice, were the authors of their own misfortune. They have no one but themselves to blame for the consequences. The Board is not prepared to nullify a vote result to accommodate subsequent complaints by these employees that they had no opportunity to vote.

In the circumstances, the Board will not set aside the vote result as previously declared and the objections to the vote are hereby dismissed."

12. The above ruling delivered at the hearing is hereby confirmed.

2638-87-JD Copper Cliff Mechanical Contractors Ltd., Complainant v. The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America Local 1425, The Ironworkers District Council and International Association of Bridge, Structural and Ornamental Ironworkers, Local 786, Respondents

Jurisdictional Dispute - Union and company electing to refer dispute to Plan in Washington - Plan not making determination as to the correctness of the assignment because the job was complete - Company filing dispute with Board - Board deprived of jurisdiction to inquire into the complaint because of s.91(14)

BEFORE: *Inge M. Stamp*, Vice-Chair, and Board Members *D. A. MacDonald* and *R. R. Montague*.

APPEARANCES: *Robin B. Cumine* for the complainant; *N. L. Jesin* and *E. Ryan* for The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America Local 1425 ("Millwrights"); *S. B. D. Wahl*, *J. Phair* and *D. Girard* for The Ironworkers District Council and International Association of Bridge, Structural and Ornamental Ironworkers, Local 786 ("Ironworkers").

DECISION OF THE BOARD; June 29, 1988

1. This is a jurisdictional dispute filed under section 91 of the *Labour Relations Act* by the complainant, Copper Cliff Mechanical Contractors Ltd. ("Copper Cliff"). The work in dispute was assigned to the Ironworkers and is the subject of a grievance filed by the Millwrights against Copper Cliff.

2. It is the position of the Millwrights that the Board is deprived of jurisdiction to inquire into this complaint because of section 91(14) of the Act which provides:

The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and such trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of such tribunal.

In the alternative, counsel for the Millwrights asks the Board to refuse to exercise its discretion under section 91(1) and 91(13) of the Act to hear this complaint.

3. The relevant provisions in the collective agreements binding Copper Cliff and the Millwrights and Copper Cliff and the Ironworkers are contained in article 14(b) of the Millwrights agreement and article 19.1 of the Ironworkers agreement which provide as follows:

14(b) If a jurisdictional dispute arises on any job between the Party of the Second Part and any other Building Trades Union that is affiliated with the AFL-CIO Building and Construction Trades Department, same shall be settled by submitting the dispute immediately to the Impartial Jurisdictional Disputes Board for a decision. The decision rendered by the Impartial Jurisdictional Disputes Board shall be recognized and immediately implemented and such decision shall be binding on all Parties to the dispute.

19.1 Any jurisdictional dispute between the Union and any other building and construction

trades union, that involves any work undertaken by an Employer, will in no way interfere with the progress and prosecution of the work. The parties agree to abide by a decision of the Impartial Jurisdictional Disputes Board and/or the Ontario Labour Relations Board.

4. The parties summarized the events that led to the instant complaint. A section 124 grievance, filed by the Millwrights, was deferred to allow Copper Cliff to apply to the Plan for Settlement of Jurisdictional Disputes in the Construction Industry (the "Plan"). Copper Cliff applied to the Plan for a resolution of the dispute. The jurisdictional dispute process was started in accordance with the rules of the Plan when the General President for the Ironworkers advised the Acting Administrator of the Plan that the job had been completed prompting a letter from the Plan's Administrator to the parties, dated August 14, 1987, stating in part:

"If the information contained in this telegram is accurate and the disputed work has been completed, there would appear to be no necessity for further action in this jurisdictional dispute".

5. It is the position of the Millwrights that the Ironworkers and the Company elected to go to Washington and thereby deprived the Board of any jurisdiction to hear this matter under section 91(14). The fact that the Plan, once it had been advised that the job was completed, did not make a determination of the correctness of the assignment, does not give the Board jurisdiction to hear this dispute.

6. Counsel for the Ironworkers acknowledged that the dispute was referred to the Plan. The Ironworkers did not contest the applicability of section 91(14), but did argue that upon the issuance of the Plan's August 14, 1987 letter there is no longer a clause in either collective agreement which provides for a resolution of the matter, and since the Plan was unwilling or unable to entertain the jurisdictional dispute, the Board can now take jurisdiction and hear this matter under section 91.

7. The Ironworkers further argued that there is a distinction between an "employer that has entered into a collective agreement" and one who is bound by statute to a provincial agreement and therefore Copper Cliff should be able to have its work assignment dispute determined on its merits by the Ontario Labour Relations Board.

8. Counsel for Copper Cliff submits that once the Ironworkers wanted to go south (the Plan) it had no choice, under its collective agreements, but to refer the dispute to the Plan. It is the company's position that everyone agreed that underlying the grievance is a work assignment dispute. The company submits that as long as this dispute could be dealt with by referring it to the Plan, the Board is deprived of jurisdiction under section 91(14). However, once the dispute cannot be resolved by the Plan, counsel for Copper Cliff submits that there is no impediment to the Board hearing this matter under section 91. It is Copper Cliff's position that it should not be at risk twice and that the Board has jurisdiction to deal with this application.

9. Without setting them out in detail, the Board has carefully considered all of the submissions of the parties and the cases cited in support of their positions.

10. Section 91(14) makes it clear that the Board does not have jurisdiction when the parties have provisions in their collective agreements requiring work assignment disputes to be referred to a mutually selected tribunal. In the instant case, the Millwrights' grievance was deferred at the request of the company and Ironworkers to permit an application for resolution of the dispute to the Plan in Washington. The question put before the Board is whether the fact that the Plan did not make a final determination of the correctness of the work assignment gives the Board jurisdiction to hear this matter under section 91.

11. As the Board has said on many occasions, whether or not the Plan, or its predecessor, operates in a manner that is satisfactory to the parties, as long as collective agreements give this body jurisdiction to deal with jurisdictional disputes, and in the absence of specific wording such as found in the EPSCA agreement, giving the Board jurisdiction if after 60 days the Plan "fails to render a decision", section 91(14) deprives the Board of jurisdiction.

12. The Plan dealt with the jurisdictional dispute in accordance with its rules. One of these rules is a time limit. It should not surprise anyone in the construction industry that the Plan will not make determinations of the correctness of a work assignment when the specific work is completed. This rule has been in effect for many years, both under the present Plan and under its predecessor. The application of the time limit does not mean that the Plan has not dealt with or entertained the jurisdictional dispute. The Plan dealt with this particular work assignment dispute in accordance with its long-established rules. Section 91(14) of the Act is not discretionary and is specifically designed not to interfere with the private arrangements of the parties, even when they are less than satisfactory. Since the Plan is functioning, although with unsatisfactory results for two of the parties to this dispute, there is no basis for the Board to assume jurisdiction under section 91(1) of the Act.

13. Employers find themselves in a difficult position when caught between competing jurisdictional claims of two or more unions, especially when the employer becomes automatically bound to provincial collective agreements pursuant to section 145(4) of the Act. However, section 91(14) does apply to parties who have become bound to collective agreements entered into by the employer and employee bargaining agencies ("EBAs"). The Board has stated on many occasions that it is open to the EBAs to negotiate wording in their collective agreements which would better serve the parties in solving their jurisdictional disputes.

14. For the above reasons, the Board finds it does not have jurisdiction under section 91(14) to hear this complaint, and it is therefore dismissed.

2192-86-R; 2366-86-M Labourers' International Union of North America, Local 506, Applicant v. Dalton Engineering & Construction Limited and Rumble Pontiac Buick (1985) Inc., Respondents; Labourers' International Union of North America, Local 506, Applicant v. Dalton Engineering & Construction Limited and Rumble Pontiac Buick (1985) Inc., Respondents

Construction Industry - Construction Industry Grievance - Related Employer - General contractor contracting with owner to provide certain construction services - General contractor bound to the Labourers provincial agreement - Collective agreement limiting general contractor to engaging subcontractors who are in contractual relations with the union - Owner subcontracting some work to a non-union subcontractor - Whether general contractor and owner can be treated as one employer - Whether general contractor in violation of subcontracting clause - Board declining to exercise its direction to make one employer declaration - General contractor not in violation of provincial agreement - Applications dismissed

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn*.

APPEARANCES: *A. M. Minsky, C. Flood and N. Barbieri* for the applicant; *Bruce Binning, Brian Foote and James Thomson* for the respondents.

DECISION OF N. B. SATTERFIELD, VICE-CHAIR, AND BOARD MEMBER D. A. MACDONALD; June 30, 1988

1. The application in Board File No. 2192-86-R is made under subsection 1(4) of the *Labour Relations Act* and requests the Board to declare that Dalton Engineering & Construction Limited and Rumble Pontiac Buick (1985) Inc. be treated as constituting one employer for purposes of the Act. The application in Board File No. 2366-86-M is a referral of a grievance in the construction industry under section 124 of the Act for final and binding arbitration. For ease of reference, the Board will refer to the respondent Dalton Engineering & Construction Limited as "Dalton" and to the respondent Rumble Pontiac Buick (1985) Inc. as "Rumble". The applicant Labourers' International Union of North America, Local 506 will be referred to either as "the Union" or "Local 506".

2. Dalton is a general contractor operating primarily in the industrial, commercial and institutional ("ICI") sector of the construction industry and Rumble operates a General Motors automobile dealership. Dalton contracted with Rumble to supply certain construction services for the building of a new automobile showroom and for the renovation of some existing facilities on Rumble's property located on the west side of Bayview Avenue north of Eglinton Avenue East in the City of Toronto ("the Project"). More particularly, the Project involved the demolition of the old showroom and the building of a new one, administration offices and customer service reception area. It also involved alterations to the existing parts department and the cash, customer waiting and storage areas.

3. Dalton and Local 506 are bound to the Labourers Provincial Agreement effective from June 25, 1986 to April 30, 1988 ("the Agreement"). They were bound also to the predecessor provincial agreement which was in effect from May 1, 1984 to April 30, 1986. The predecessor provincial agreement was in effect when the Project was started but the work which gave rise to these applications began while the Agreement was in effect. The Agreement limits Dalton to engaging subcontractors who are "in contractual relations" with the Union or its sister affiliated bargaining agents for the performance of work coming within the Agreement's scope. The parties are agreed that, for purposes of this proceeding, the work involved with the demolition of the showroom, certain other demolition and the removal of a concrete slab, was work coming within the scope of the Agreement and was also work covered by Dalton's commercial contract with Rumble. The work was performed by A.B.C. Demolition (hereafter "ABC"). ABC was not in contractual relations with Local 506 or any of its affiliates. The commercial contract for performance of the work was nominally between Rumble, as the owner, and ABC.

4. The applicant contends that the performance of the work by ABC was a violation of the Agreement by Dalton because Rumble and Dalton were under common direction or control within the meaning of subsection 1(4) of the Act and should be treated as constituting one employer, making Rumble bound to the Agreement, or, in the alternative, in substance, it was Dalton which contracted with ABC notwithstanding that the form of the contract was between Rumble and ABC. Local 506 counsel claims that the arrangement under which Rumble entered into a contract with ABC to perform the work was a sham designed to allow Dalton's subcontracting obligations to be circumvented. Whether or not that was the intention of the arrangement, the result was still a violation of their Agreement according to applicant counsel. Counsel for the respondents admitted in his opening statement to the Board that the decision to have Rumble enter into the contracts

with individual trade contractors came about because of Dalton's subcontracting obligations under the Agreement.

5. Both counsel remarked to the Board at the outset that they considered these to be important cases involving subcontracting obligations under construction industry collective agreements and that they were unaware of any reported decisions of the Ontario Labour Relations Board involving the form of commercial contract between the prime contractor on a project and the owner of the project, such as is in evidence here. Union counsel considers the cases important because, in his view, they involve the principle of whether a contractor bound to a collective agreement can rely on the form of a commercial contract to avoid an obligation under a collective agreement to contract work only to contractors who are also in a collective agreement relationship with the Union. For example, Dalton should not be able to hide behind its commercial contract with Rumble, which provides that Rumble and not Dalton will enter into contracts with trade contractors who perform the work on the Project, and be free of liability under the Agreement should work covered by the Agreement be performed by contractors who are not under a collective agreement obligation with the Union or any of its affiliates. Counsel for Dalton, on the other hand, considers them to be important cases because they affect the freedom of owners as purchasers of construction to determine the most advantageous form of commercial contract for purchasing the construction services which they need.

6. The commercial events giving rise to these applications began in September, 1985, but the specific work performed by ABC which caused the Union to make these applications was performed in September 1986. On or about October 2, 1986, the Union delivered to Dalton a grievance alleging that Dalton had violated clause 2.05 of the Agreement and, by further letter from its solicitors dated October 28, 1986, the Union advised Dalton that it was joining Rumble as a party to the grievance and was making application under subsection 1(4) of the *Labour Relations Act*. That application in File No. 2192-86-R was made October 30, 1986. The grievance in File No. 2366-86-M was referred to the Board under section 124 of the Act on November 20, 1986. These proceedings first came before the Board for hearing on January 27, 1987, and were heard over a further nine days of hearing until June 29, 1987.

7. The Board heard the testimony of Keith L. Gillam, Gerald A. Wood, Alfred (Nick) Thurston and James Thomson for the respondents, George Cummings and John Stefanini for Local 506. Gillam is senior vice-president of Dalton and Wood is the president of Rumble. Thurston and Cummings are both consultants specializing in the construction industry with many years of experience in the management of construction projects. While each party asked questions about the qualifications of Thurston and Cummings consistent with seeking to qualify them as expert witnesses before the Board, the Board was not asked to rule on whether they were expert witnesses even though some of the evidence admitted was in the nature of opinion evidence. Since it is unnecessary for the Board to rely on any opinion evidence which they might have given, the Board also finds it unnecessary to rule on whether they were properly qualified as expert witnesses. Thomson and Stefanini were called to testify about the recent negotiating history of the parties to the Agreement. Thomson is general manager of the Labour Relations Bureau of the Ontario General Contractors Association, one of several employer organizations which comprise the Labourers employer bargaining agency. Stefanini is business manager of the Labourers Ontario Provincial District Council, which, together with the Labourers' International Union of North America make up the designated employee bargaining agency which is the union party to the Agreement. Theirs was extrinsic evidence and was received subject to the argument of the parties respecting whether it should be admitted in the first instance and, if admitted, the weight to be given to it. Since the Board has found it unnecessary to rely on their evidence in order to determine the issues before it, it is unnecessary to rule on its admissibility. The witnesses were all credible and, subject to the

aforementioned exceptions, the findings of fact herein have been made on their evidence, the documentary evidence before the Board and the submissions of counsel respecting the conclusions of fact which the Board should make from that evidence.

8. Wood is the president, general manager and sole owner of Rumble. Rumble operates the dealership and is in no other business, except for the fact that, on or about December 31, 1986, the shares, land, buildings and other assets of the predecessor dealer which had been beneficially acquired by Wood on or about November 28, 1985, were transferred to Rumble.

9. Peter John Dalton is president of Dalton and his wife, Patricia, is secretary-treasurer. They are its only shareholders and directors. They, Gillam and Keith Williams, are the officers of Dalton. Gillam is senior vice-president and Williams is comptroller. Dalton started in the construction business in 1940. It is a general contractor performing construction projects under a variety of contractual arrangements: stipulated sum; cost plus; construction management and combinations of construction management and stipulated price. It has constructed projects ranging in size from \$500,000 to \$15,000,000. Eighty-five per cent of its construction projects during the last ten to fifteen years have been performed on a construction management basis, the majority being approximately five to six million dollars in value.

10. Gillam described construction management as a contractual arrangement under which the contractor becomes involved from the concept of a project, allowing it to have input to such things as designing and planning the project and selecting mechanical equipment, construction materials and methods. By contrast, under a stipulated sum contract the contractor usually becomes involved at the time construction is ready to begin. Gillam described this latter situation as one in which the contractor has priced and bid the project after its design has been settled and has been bound to a contract at his bid price. The fixed price, Gillam claims, creates a distinct division of interest between the contractor and the owner, the contractor's objective being to bring the project in at or below the bid price and the owner having relatively little to say in the way the construction is performed. The contractor would be the beneficiary of any savings under the bid price. Gillam characterizes that relationship as somewhat adversarial.

11. On the other hand, he characterizes the construction management relationship as a co-operative one in which, at least insofar as Dalton's construction management contracts are concerned, the contractor is involved together with the owner right from the beginning, the owner is an integral part of the project management team and the beneficiary of any favourable variance from the budget. Gillam's characterization of the construction management relationship as a co-operative one finds support in Dalton's written proposal to Rumble referred to *infra* at paragraph 13. It speaks of Dalton acting for Rumble to cause "... the performance by others of architectural and engineering services...". It invites Rumble's participation in the Project from start to finish; proposes that Dalton "... co-ordinate the efforts of Rumble and its Architectural Engineering and Construction Programme." and work with Rumble and its architect to construct the Project.

12. In recent years, Dalton has acquired substantial experience in the construction of automobile showrooms, particularly for General Motors dealers. At the time of these proceedings, it was currently engaged in, or had recently completed, the construction of showrooms for five dealers, three of which were General Motors dealers. It was through one of the General Motors dealers that Dalton and Rumble came into contact with each other. That contact led to Dalton making a formal proposal for the construction of Rumble's showroom and the related demolition and alteration work. The proposal was made by letter dated September 11, 1985 for Dalton to be construction manager for Rumble on the Project. Part of the construction services which Dalton proposed to supply to Rumble included the setting of bid specifications for trade contractors, evaluating the

bid tenders received, recommending to Rumble the trade contractor which should perform the particular work and letting of the contracts to the selected contractor. The proposal called for the contracts to be let in Dalton's name. That was not acceptable to Rumble. While Wood wanted Rumble to have the benefit of Dalton's expertise with constructing showrooms and other facilities for General Motors dealers, he wanted Rumble to let the contracts directly to the trade contractors. This was because Wood wanted to have as much control as possible over how things were done on the Project and he did not want unionized contractors to be used on the Project. Wood told the Board that he had no use for unions and believed that their presence on the Project would compromise his objective of Rumble getting the best price, productivity and quality. He believed also that Dalton would be obligated to engage union contractors.

13. Dalton eventually amended its proposal to provide that the contracts with the trade contractors would be between Rumble and the contractor. Dalton and Rumble entered into a formal contract on that basis (hereafter "the Contract"). The Contract was dated to be effective from January 14, 1986 although it is not entirely clear on the evidence when it was actually executed. The type of contractual arrangement with Rumble which Dalton had proposed, as the Board noted above, was what Dalton considered to be a construction management contract. While there are standard forms of contract used in the construction industry in Canada for certain types of general construction services, none exists for construction management. For that reason, Dalton used a standard form of contract approved by The Royal Architectural Institute of Canada and The Canadian Construction Association known as "Document No. 13" "CANADIAN STANDARD FORM OF CONSTRUCTION CONTRACT" for use when the work is being done on a basis of a "COST PLUS CONTRACT". It has been Dalton's practice to use this document format and to amend it as required to suit the construction management contractual conditions. This is usually done by incorporating into the contract document Dalton's proposal setting out all of the services which it would provide as construction manager. To that end, the September 11, 1985 letter containing Dalton's initial proposal to Rumble was made to form part of the Contract, as were later letters.

14. In keeping with Dalton's proposed construction management approach, Dalton did become part of the Project management team right from the start of the Project, together with Rumble (in the person of Wood), its architect and its design engineer. The following are some of the specific services which Dalton undertook and performed for Rumble pursuant to the Contract:

Pre-construction Services

- (1) Perform, or cause the performance by others of all architectural and engineering services including: the preparation of an architectural, and engineering and construction program as the basic device for controlling the Project; and co-ordinating the preparation of plans and drawings.
- (2) Together with Rumble and the architect, prepare a master schedule for the performance of the major phases of the Project.
- (3) Prepare for Rumble's approval a preliminary budget, detailed cost estimates and the final budget for the Project.
- (4) If the detailed cost estimates require, recommend to Rumble modifications to the design specifications in order to bring the estimated costs within limits acceptable to Rumble.
- (5) Organize the work covered by the Contract into trade divisions for competitive bidding and prepare a schedule for the tendering and performance of the work.
- (6) Prepare a list of contractors in each trade for bid tendering purposes.

- (7) Prepare bid specifications and invitations to bid, and arrange for tenders to be submitted to Rumble.
- (8) Evaluate the tenders submitted and recommend to Rumble the awarding of contracts.
- (9) Prepare the Contract documents for execution between Rumble and the selected trade contractors.

Construction Services

- (10) Monitor and control costs throughout the duration of the Project.
- (11) Assume total responsibility for all work covered by the Contract, including scheduling, co-ordinating and supervising the work of all trade contractors and approving their invoices for payment.
- (12) Submit monthly progress applications to Rumble for the funds with which to pay the trade contractors for completed work to date.
- (13) Be Rumble's disbursing agent for the progress payments to the trade contractors for completed work.
- (14) Certify to Rumble that all work contracted for by the trade contractors was completed pursuant to the terms of the Contract and recommend payment of amounts held back from the progress payments.
- (15) Warrant for one year the work coming under its Contract with Rumble which was performed for Rumble under its contracts with the trade contractors.

While the Board has grouped the services as "pre-construction" and "construction", one of the reasons why Dalton and Rumble entered into this type of contract was to be able to begin the Project before a final design was available. Therefore, most of the services grouped as "pre-construction" continued to be performed after physical construction had begun.

15. The Contract established Dalton's fee for performance of the work at 3 1/2 per cent of the cost of the work covered by the Contract. The cost of the work is defined in Article A-4 of Document No. 13. It includes, amongst other things, the cost of work performed by the trade contractors. The Contract provided for Dalton to receive a 15 per cent overhead charge on the cost of changes made by Rumble in the work covered by the Contract. The terms of the Contract had provided also for a guaranteed upset price to be set when the final budget for the Project was struck. The total budgeted cost of the Project, including Dalton's fee, was to be the guaranteed upset price. When a guaranteed upset price is established under a type of contract such as the Contract is, it is the contractor's guarantee to its client that the "cost of the work" defined in the contract will not exceed that amount. The way Dalton operates, if the guaranteed upset price is exceeded, Dalton bears the cost. If the actual cost is less than the guaranteed upset price, the benefit falls to the client. Each time there were changes to the budget, however, the guaranteed upset price rose as the total budget rose and eventually there were enough changes that the guaranteed upset price ceased to be a factor and, indeed, was abandoned.

16. Dalton usually lets the contracts to the trade contractors in its own name under these arrangements, but sometimes the contracts are let in the name of the owner with whom Dalton has contracted. In either event, when the work to be performed by trade contractors is work coming within any of the six collective agreements to which Dalton is bound, it has been let to contractors who were in a collective agreement relationship with the relevant trade union. The Project was the first exception to that practice. In addition to the Agreement, Dalton is bound to the provincial

agreements for the following trades: bricklayers, carpenters, cement masons, operating engineers and rodmen. They, together with the Labourers are referred to colloquially as the civil trades.

17. The Contract clearly provides for Rumble to let the contracts to the trade contractors and not Dalton. Article 40 of the General Conditions of Document No. 13 has been amended to that end. The article deals with the relations of the contractor and subcontractor. By the terms of the document, Dalton is contractor and a trade contractor would be a subcontractor. The word "owner" has been substituted for the word "contractor" wherever it appears in the preprinted wording of Article 40. The terms of the article obligate Rumble to bind every subcontractor to the terms of the Contract documents between Rumble and Dalton insofar as they are applicable to the subcontractor's work.

18. The instructions to bidders in the bid specifications issued by Dalton to the trade contractors being invited to bid on work included the advice that they would be required to sign a contract with Rumble for any work let to them in a form of contract similar to the one used by Dalton when it awards contracts. A copy of Dalton's form of contract was included as part of the bid specifications. The written contracts executed by Rumble and trade contractors were in the same form as the ones Dalton would have signed with them, except for changes made necessary to accommodate the substitution of Rumble for Dalton. The contracts incorporated by reference the Contract, including its General Conditions, drawings and specifications, including the bid specifications.

19. The parties put before the Board twenty-seven contracts executed between Rumble and trade contractors pursuant to Article 40, all signed by Wood for Rumble. One of them was a contract with Keith Plumbing & Heating Inc. to supply and install certain plumbing, drainage and gas piping which Wood executed for Rumble without consultation with Dalton. Wood directed Dalton to use Keith because he had used the firm before. According to Wood, Rumble also contracted with two other contractors without entering into written contracts. Wood had done business with both of them before. One was with Electriclee Ltd. for electric work, some of which came within the scope of the Contract between Dalton and Rumble. The other was with P. Tomas Masonry for interior masonry work on renovations to the existing building. It was not part of the budget for the Project. Dalton supervised the work of both contractors, but did not claim any fee for Tomas' work. Rumble paid both contractors directly. Dalton warranted for one year the work of all contractors whose work it supervised, except that of Electriclee. The trade contractors who executed contracts with Rumble warranted their work for two years to both Rumble and Dalton, pursuant to the bid tendering conditions which were made part of their contracts with Rumble.

20. Seventy-five to eighty-five per cent of the value of all work performed on the Project was done by contractors in collective bargaining relationships with building trades unions. One exception was the demolition work performed by ABC pursuant to the contract executed between it and Rumble. Dalton had prepared a list of four contractors who were invited to bid on the work, three of whom submitted bids. ABC was the low bidder and Wood directed Dalton to take ABC and prepare a contract for execution between ABC and Rumble. It is implicit in Gillam's evidence that Dalton did not recommend to Rumble to let the contract to ABC. ABC was paid approximately twenty thousand dollars for its performance of the contract.

21. Dalton performed all of the services for which it contracted with Rumble, including in particular the services referred to in paragraph 13 above and miscellaneous labouring and carpentry work on the Project site. Dalton employed directly an average of two labourers and carpenters for the on-site work. Dalton was paid approximately \$273,000 for its services, of which \$115,000 came from management and technical services additional to those covered by the 3 1/2 per cent construction management fee; \$88,000 came from the cost of direct labour and materials related to

the miscellaneous labouring and carpentry work; \$47,000 came from the construction management fee and \$23,000 from the overhead charges on change orders. The total cost of the Project coming within the Contract, including the payments to Dalton, was approximately \$1,315,000.

22. Rumble in the person of Wood was directly and actively involved in the pre-construction and construction phases of the Project. With respect to pre-construction activities, he was involved together with Dalton in the designing, planning and budgeting elements of the Project. His approval was required at each major stage and for any revision to the budget. His was an active involvement. For example, Wood disagreed with the showroom roof design proposed by his architect, Sankey, and had it changed. The design which Wood ultimately accepted was proposed to Sankey by Dalton. It was less costly than the original proposal and was instrumental in bringing the Project budget within Rumble's financial resources. Gillam cited this incident as an example of the value to a purchaser of construction having an experienced contractor involved at the design stage, as allowed by the construction management approach. Gillam also gave an example of how the early involvement of the contractor can influence beneficially the selection of construction materials. Dalton identified a potential problem with the showroom flooring specified by Sankey. Dalton relied on its experience with constructing automobile showrooms to get Rumble's approval to install a more durable and less costly flooring. Wood disagreed with his architect's advice on other aspects of the Project's design, leading to changes in its design as the Project developed. These disagreements were usually resolved by Wood and Dalton. True to Wood's objective of having as much control as possible over the Project because, as he put it, he was paying the bills and, as owner, had to live with the result, he visited the Project daily, checking the work, meeting with Dalton's site superintendent and attending the weekly job meetings with Dalton and the trade contractors. Many of the change orders on the Project were the result of Wood's close attention to it. Wood also met directly with the trade contractors to resolve problems. If he was not satisfied with a trade contractor's work, whether or not Dalton had approved it, he had it corrected to his satisfaction either by dealing directly with the trade contractor or going through Dalton. Sometimes Dalton's involvement was critical to resolving disputes with trade contractors about the work.

23. The Board has reviewed and weighed the able submissions made by both counsel, but will attempt neither to set them out in full nor to make a comprehensive summary of them. Instead, the Board will refer to and summarize particular aspects of their submissions as required by the decision. It will deal first with the grievance referral. While it contains allegations of violations of the hiring provisions of the Agreement as well as the subcontracting provisions, the entire focus of the Union's evidence and representations was on the allegation that Dalton had violated clause 2.05 of the Agreement by failing or refusing to engage only subcontractors who are in contractual relations with Local 506 and/or its affiliated bargaining agents. Clause 2.05 provides that:

[t]he Employer agrees to engage only sub-contractors who are in contractual relations with the Union and/or its affiliated bargaining agents for *all work covered by this Agreement, or work forming part of an I.C.I. General Contract,...*

[emphasis added]

Counsel for the parties agree that the demolition work which ABC performed is work covered by the Agreement. What they do not agree on is whether, in the particular context of the contractual relationship between Dalton and Rumble, the work comes within the reach of clause 2.05. Local 506's counsel says it does because it is work coming within the scope of the Agreement, and, in the words of clause 2.05, forms "...part of an I.C.I. General Contract..." between Dalton and Rumble, a contract under which Dalton took on all of the responsibilities of a general contractor for the work of the Project. According to counsel, that was the substance of the contractual relationship between them and that substance was not changed by the form of the relationship which called for

Rumble to let the trade contracts. Counsel for Dalton and Rumble, on the other hand, takes the position that the demolition work was not Dalton's to let. It was Rumble's work and Rumble is not bound to the Agreement. Therefore, the work is beyond the protection of clause 2.05.

24. Union counsel's primary argument was that Dalton cannot circumvent the clause 2.05 subcontracting obligation by having a third party like Rumble let the subcontracts for the work coming within their Contract. In other words, Dalton cannot do through Rumble that which clause 2.05 prohibits Dalton from doing itself. Counsel submits that, regardless of whether Dalton's contractual relations were those of a general contractor on a fixed-price contract, a cost plus contract or a construction management contract, it is obvious that Dalton was responsible to Rumble for ABC's work in the same manner and to the same extent as any general contractor under any form of contract. The only thing which Rumble did with respect to ABC was to select it from amongst the three contractors who bid the work and execute the contract prepared by Dalton. Therefore, the substance and reality of the arrangement was that ABC's subcontract, while nominally with Rumble, was effectively with Dalton. The mere formality of Rumble signing the trade contract with ABC alters neither the substance of the arrangement nor Dalton's obligation under clause 2.05. In those circumstances, counsel argues, the subcontract let through Rumble to ABC for the demolition work was a violation of clause 2.05 by Dalton.

25. Union counsel relies on *Litwin Construction (1973) Ltd.*, [1982] 2 Can LRBR 349, as authority for his primary argument. It is a decision of the Labour Relations Board of British Columbia ("the B.C. Board"). Litwin was bound to a collective agreement with the Carpenters Union which included a subcontracting clause generally similar to clause 2.05 of the Agreement. Litwin was the owner of property on which residential units were being constructed for marketing in a series of units as income tax shelters. Litwin was the developer of the project and responsible for bringing it to substantial completion within a stipulated maximum cost. O'Brian Financial Corporation was the marketer of the project, responsible for attracting individual investors who would purchase the units and qualify under the *Income Tax Act* as developers of those units. One of O'Brian's responsibilities to these individuals was to enter into a construction contract for the project. It entered into a construction contract with Absolon Construction Ltd. Absolon was not bound to any agreement with the Carpenters. Absolon had made it possible for Litwin to acquire the property for the project, in return for which Litwin had made a business commitment to Absolon for it to construct the project. O'Brian did not represent any individual investors at the time it let the contract to Absolon, although a few of them became involved in the project before construction commenced.

26. The Carpenters claimed Litwin was in breach of the subcontracting clause of their agreement by allowing Absolon to construct Litwin's project. The Carpenters applied under section 37 of the B.C. Labour Code for a declaration that Litwin and O'Brian constitute a single employer and requested the B.C. Board's assistance under subsection 96(1) of the Code respecting the alleged breach of the collective agreement binding on the Carpenters and Litwin which underlay the section 37 application. That subsection gave the B.C. Board jurisdiction to inquire into the difference, if the Board believed the difference to have been arbitrable at the time it was referred, and make an order for final and conclusive settlement of the difference.

27. The B.C. Board acknowledged that the individual investors may be developers for purposes of the *Income Tax Act*, but found that, for purposes of the Code, Litwin had put the project together, controlled it and was the developer. One of the steps Litwin had taken in putting the project together, according to the Board, was its "...decision to utilize Absolon Construction as the construction contractor.". While the contract for the construction of the project was nominally between O'Brian and Absolon, the B.C. Board decided that, in substance, it was Litwin which had

engaged Absolon. The Board commented as follows at page 363 in finding that Litwin had breached the Carpenters collective agreement.

...The language of Clause 3.02, it will be recalled, commits the employer not to "contract or subcontract any work within the jurisdiction of the...Carpenters..." unless the contractor is bound by the Carpenters' standard agreement. The facts of this case constitute a compelling statement of the reasons why the scope of this language must not be confined to work contracted or subcontracted pursuant to a formal written contract. If it were restricted in that manner, then obviously the obligation could be effectively ignored by not entering into a formal, written contract or by arranging for another party to make the formal contract. Clearly, the collective agreement provision must be interpreted so as to prevent the employer signatory to the collective agreement from avoiding its obligation by means of a manipulation of the form of contract; the language must be interpreted to prohibit the employer from informally or indirectly granting or committing work within the Carpenters' jurisdiction to contractors not bound by the Carpenters' standard agreement. Here, the decision to contract with Absolon Construction at the time it was made was effectively Litwin's. By honouring its "business commitment" to Absolon Construction, the substance of what occurred was a breach by Litwin Construction of its collective agreement subcontracting clause.

28. Counsel for Local 506 takes the position that the B.C. Board's decision is a direct, legal precedent for the piercing of commercial relationships that avoid collective agreement obligations, even absent any intent of avoidance. Or, put another way, counsel relies on Litwin for the proposition that a contractor cannot do indirectly through another party that which it is prohibited from doing itself under a collective agreement.

29. In the alternative, counsel argues that, even if Dalton is construction manager of the Project for Rumble, it is the general contractor of the project as well. Under the Contract, Dalton contracted to do everything on the project that any general contractor would do except award and execute the formal contracts with the trade contractors. Moreover, even though Dalton did not award and execute the formal contracts, the value of those contracts was part of the cost of the work on which Dalton's fee was calculated and paid and Dalton was independently liable for the quality of the work done under the trade contracts. Those conditions, counsel submits, place Dalton in essentially the same position as an independent general contractor. In that position, Dalton was independently liable for the demolition work awarded to and performed by ABC. Since the Contract was "... an I.C.I. General Contract..." as contemplated by clause 2.05, under which Dalton was the contractor, and since the demolition work formed part of the Contract, the demolition work falls within the protection of clause 2.05. Thus, when Dalton agreed by the Contract to allow Rumble to award the work to ABC, Dalton breached clause 2.05 of the Agreement.

30. Counsel for the respondents argues, in the first instance, that the Board's jurisdiction respecting the alleged violation of clause 2.05 of the Agreement is that of an arbitrator established under a collective agreement. While the Board has available to it all of its usual statutory authority respecting its composition and how it will proceed when acting under section 124, it sits and gives its decision as an arbitrator (*Re International Association of Heat & Frost Insulators & Asbestos Workers Local 95 and Master Insulators Association of Ontario et al*, (1979) 25 O.R. (2d) 8. Therefore, the Board is restricted to the facts before it when interpreting and applying clause 2.05 of the Agreement. Since Rumble, not Dalton, let the contract which is alleged to create the violation of clause 2.05 there can be no doubt that Rumble, not Dalton, engaged ABC. Thus, Dalton could not be bound by the clause and could not have breached it. Counsel submits that the circumstances of this case are no different in principle than where an owner lets a contract to a unionized general contractor and, before the work is performed, takes back a parcel of work and awards it to a non-union contractor. The parcel of work has been awarded by the owner, not the general contractor, and, counsel claims, the general contractor cannot be held in breach of a subcontracting clause as a result of the owner's actions.

31. The second branch of counsel's argument is that the terms of the Contract established Dalton as Rumble's agent. Counsel referred the Board to numerous authorities, including general texts and case law, respecting the establishment and effect of an agency relationship. The Board has reviewed them in the context of counsel's particular references in his submissions, but will not set them out in this decision. Counsel submits that, since an agent acting within the terms of its agency relationship is acting for the benefit of its principal, if the agent enters into a contract with a third party, the contract is only binding on the principal, not on the agent. Therefore, even if Dalton had awarded and executed the trade contracts, they would have been binding only on Rumble, not on Dalton, and it would be as though Rumble had made the contracts. Rumble is not bound by the Agreement and cannot violate its subcontracting provisions. Thus, there would be no violation of clause 2.05 by either Dalton or Rumble. The trade contractors who were invited to bid on the parcels of work would have been aware of the contractual relations between Dalton and Rumble and the fact that Dalton was Rumble's agent, according to counsel, because the contractors were supplied with all of the contract documents between Rumble and Dalton.

32. The Board does not share union counsel's enthusiasm for the precedential value of the B.C. Board's decision in *Litwin Construction*, *supra*, in deciding the instant case. The cases are readily distinguishable on their important facts. Litwin, the party having the collective agreement obligation, was also the owner of the property being developed, put the project together and was in control of the project when it selected Absolon to be the construction contractor and arranged with O'Brian to let the formal contract to Absolon. In the instant case, Rumble, the party which owned the property and put the project together, had no collective agreement obligations when it let the contract to ABC for the demolition work.

33. The fact that the Board does not find the *Litwin Construction* decision to be of assistance in deciding this case, however, does not relieve the Board from the task of deciding whether Dalton engaged ABC for the demolition work in violation of clause 2.05 of the Agreement.

34. The Board long has recognized provisions in construction industry collective agreements like clause 2.05 of the Agreement to be significant union security provisions. The Board also has found that such provisions do not violate any section of the Act. See *The Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022, at paragraph 45. The decision also deals extensively with the underlying rationale and purpose of such clauses in construction industry collective agreements. Much of what the Board said is succinctly summarized in the following statement from another Board decision, *Brant County Board of Education*, [1986] OLRB Rep. Sept. 1187, at paragraph 6:

The very origin of the subcontracting clause is to prevent an employer bound by a collective agreement from avoiding that collective agreement by contracting out the work rather than performing the work with its own employees. Such clauses have been regarded by this Board (see, *The Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022) as valid "union security" provisions in that they attempt to protect a legitimate concern of the trade union, i.e. rendering bargaining rights meaningless by subcontracting. The impact of the clause then is to say to the employer "you don't have any employees in the construction industry but you ought to have our members working on the job and therefore you have violated our collective agreement." Almost by definition then, it will be seen that in subcontracting cases, such as the present, there is no employment relationship to place the respondent in the construction industry.

Clause 2.05 seeks to protect Local 506's bargaining rights by avoiding having them rendered meaningless by subcontracting the work on which they are founded to a contractor who is not obligated to employ members of Local 506, or its affiliated bargaining agents to perform the work.

35. The place of clause 2.05 in the Agreement shows it to be an integral part of broad union security provisions, all of which focus on preserving to members of the Union work coming within the Agreement's scope. Clause 2.05 is part of Article 2 - Union Security, Work Jurisdiction, Assignment of Work, Subcontracting. Clause 2.01 commits Dalton to employ only members in good standing of the Union or its affiliates "... for work covered by the Agreement.". In clause 2.03 Dalton "...acknowledges and agrees that work covered by this Agreement is within the exclusive jurisdiction of the Union...notwithstanding the claim of any other Trade Union.". Further, in clause 2.04, Dalton agrees that "..., it shall assign exclusively to members of the Union...*all of the work covered by this Agreement.*" notwithstanding the claims of any other trade union. The attempt to secure the "work covered by the Agreement" to the members of the Union is continued in Article 3 - Hiring of Employees. Clause 3.01 obligates Dalton to obtain its employees for work under the Agreement by referral from the Union. If the Union cannot supply employees within the stipulated time limit, Dalton is free to find its own supply, but anyone it hires must either be or become a member. Finally, clause 2.06 operates in conjunction with Article 8 - Jurisdictional Disputes to attempt to safeguard the Union's claimed work when its claim is challenged by another trade union.

36. The language of clause 2.05 commits employers like Dalton who are bound to the Agreement to "...engage only subcontractors who are in contractual relations with [Local 506] for all work covered by [the Agreement], or work forming part of an I.C.I. General Contract...". Dalton was fully aware of this commitment when it accepted the Contract with the condition that Rumble would award the trade contracts. Dalton knew also that work covered by the Agreement likely would be let to contractors not bound by the Agreement and that Dalton would have the same responsibility to Rumble for the trade contractors' performance of the work as would have been the case had Dalton been responsible for executing the formal contracts with them. The question for the Board is whether, by entering into and fulfilling those terms of the Contract with respect to the demolition work done by ABC, Dalton, not Rumble, engaged ABC to perform the work.

37. The parties to the Agreement, in adopting the language of clause 2.05, did not specify what constitutes engaging. Union counsel submits that engage means to bind by contract, but not necessarily by a formal written contract directly between the two contracting parties. As the Board understands counsel's primary argument, he is saying that, because of the terms of the Contract and the work which Dalton was required to perform for Rumble under those terms, when Rumble executed the trade contract with ABC for the demolition work, the two documents operated to bind Dalton and ABC to a contract for ABC to perform the work for Dalton. In his alternative argument, the Board understands counsel to be saying that, by entering into the Contract with Rumble, Dalton had contracted with Rumble to have Rumble engage ABC to perform the demolition work for Dalton. While a strong argument can be made that, having regard to the purpose of clause 2.05 and its place in the overall union security regime of the Agreement, the language of the clause should be construed broadly so as to capture the various ways in which contractors are engaged to perform work, the question of whether the clause has captured a particular fact situation requires a factual finding that the contractor having the obligation to "engage" has done the engaging. In this case, that obligation rests on Dalton.

38. The language of the Agreement referred to above at paragraph 35 clearly gives any employer who, like Dalton, is bound by it, a choice of performing work with his own employees or engaging "...sub-contractors who are in contractual relations with [Local 506]...". It is implicit in that language that, in order to be in a position to make that choice, the employer must have control over the work. If the employer is not the owner of the project, this means that the employer must have acquired some right or obligation to perform the work. The facts of this case are clear:

Rumble owned the Project and, at the point when it contracted with Dalton for the construction services described at paragraph 14 of this decision, it was Rumble and not Dalton which was in the position of deciding whether to construct the Project by hiring its own tradesmen or by contracting to have it constructed by the tradesmen of another employer or other employers. When Rumble decided to enter into the arrangement with Dalton, it expressly reserved to itself the choice of the contractors who would construct the Project and the right to bind them directly to Rumble for the performance of the work. Wood's conduct with respect to awarding and executing the trade contracts for Rumble was wholly consistent with that express reservation. Under the terms of the trade contracts, the trade contractors warranted their work to Rumble for two years. It was only after each trade contract was executed by Rumble that Dalton became responsible for supervising the performance of the trade contract and for warranting to Rumble for one year the quality of the finished work. The fact that Dalton made itself independently liable for the work of the trade contractors who had been selected by Rumble and bound by contracts with it to perform the work of constructing the project does not alter the fact that Rumble, having exercised the initial choice to have the work done by the employees of other employers, expressly withheld from Dalton the right, obligation or opportunity to make that choice or to choose the employers whose employees would construct the Project. On the facts of this case, Dalton did not acquire the right or obligation to make those choices. Consequently, at the time each trade contractor was engaged, Dalton did not have control over the work being awarded essential for it to have engaged the contractor either directly or indirectly. Nor, on the facts of this case, can it be said that Rumble did nothing more than sign the trade contracts, that its awarding and executing of contracts was a mere matter of form and a subterfuge. Rumble, through Wood, engaged three contractors, Keith Plumbing, Electriclee Ltd., and Tomas Masonry, because Wood knew them. Even with ABC, without waiting for any recommendation from Dalton, Wood simply instructed it to prepare a contract for Rumble to execute with ABC, the obvious low bidder.

39. The substance of the contractual arrangement between Dalton and Rumble, on the facts of this case, was that Rumble and not Dalton engaged the trade contractors regardless whether the form of the arrangement was that of a construction management contract, a cost plus general contract or a general contract. Therefore, in all of the foregoing circumstances, the Board finds that it was Rumble Pontiac Buick (1985) Inc., and not Dalton Engineering & Construction Limited which engaged A.B.C. Demolition to perform the demolition work. In the result, Dalton Engineering & Construction Limited has not violated clause 2.05 of the Labourers Provincial Agreement which was in effect from June 25, 1986 to April 30, 1988.

40. That leaves to be decided the applicant's request that the Board declare, pursuant to subsection 1(4) of the Act, that Dalton and Rumble be treated as constituting one employer for purposes of the Act. Even were the Board to find that the preconditions exist for the Board to have the discretion to make the declaration requested, in the circumstances of this case, the Board would not make the declaration. Rumble was not under any statutory or contractual prohibition from seeking to have the Project constructed with non-union labour. Dalton's contractual obligation under the Agreement was to engage only subcontractors who are in contractual relations with Local 506 for work covered by the Agreement. That obligation is not a prohibition against Dalton selling its construction expertise to purchasers of construction in such a manner as to not require or cause it to engage subcontractors. If, when the parties to the Agreement negotiated clause 2.05, their objective was to prohibit employers from entering into contracts like the one between Dalton and Rumble, it was open to them to negotiate language which would achieve that purpose. Building trades unions have demonstrated an ability to negotiate a wide variety of conditions aimed at preserving employment opportunities for their members and protecting the bargaining rights of the unions. For example, clauses have existed in construction industry collective agreements in Canada for many years which allow employees to refuse to work with materials which have not been fabri-

cated by members of the union party to the collective agreement. Similarly, there are agreements in the construction industry which permit members of a trade union employed by an employer under collective agreement with the union to refuse to work for the employer on a project where “non-union” trades are employed. In the Board’s view, the bargaining table is the appropriate forum for a union to seek those kinds of protections for its bargaining rights.

41. Were the Board to declare that Dalton and Rumble be treated as constituting one employer for purposes of the Act, the effect would be to bind Rumble to the Agreement and make it in breach of clause 2.05 for having engaged ABC to do the demolition work. That would have the effect of giving the parties to the Agreement a result which they failed to negotiate and would be analogous to the Board using its discretionary powers under subsection 1(4) to extend bargaining rights rather than to preserve them. The purpose of subsection 1(4) is to preserve rather than extend bargaining rights. Accordingly, the Board has consistently declined to exercise its discretion and declare that two or more entities be treated as one employer for purposes of the Act where the effect of the declaration would be to extend bargaining rights.

42. The Board long has recognized that bargaining rights and the employer obligations flowing from them attach to a business or activity which gives rise to employment. In the present case, the Agreement defines Local 506’s bargaining rights and Dalton’s obligations in respect of those rights. The business or activity carried on by Dalton to which those rights and obligations attach is its performance of work covered by the Agreement. As the dissent correctly points out at paragraphs 29 and 30, an employer like Dalton who is bound to the Agreement and acquires work covered by it, is obligated to have the work performed by members of Local 506. However, it is implicit in all of the clauses creating Dalton’s obligation under the Agreement that, in order to be bound to the terms of the Agreement, Dalton first must have acquired in the commercial sense the right or obligation to determine whether to hire and assign the work or to engage another contractor to do the work with that contractor’s employees. As the dissent recognizes at paragraph 31, Dalton did not acquire the right or obligation to perform the demolition work at issue. In the view of the majority, that fact is as pivotal a consideration to the exercise of the Board’s discretion under subsection 1(4) as it was to finding that Dalton had not violated clause 2.05. This is because subsection 1(4) can be triggered to protect bargaining rights when a business or activity to which they attach is transferred to a related business or activity without any of the usual indicators of a transfer of a business which would attract section 63 of the Act. See *Brant Erecting, supra*, at paragraph 14. Were one to agree with the dissent that Dalton and Rumble carried on associated or related activities under common control or direction, and had Dalton transferred to Rumble a business or activity in the form of work covered by the Agreement which it had the right or obligation to perform, a one employer declaration well may have been an appropriate remedy. On the facts before the Board in this case, however, Dalton did not have any business or activity to transfer to Rumble.

43. While the Board has concluded that it should not issue a single employer declaration on the facts presented by this particular case, such a conclusion does not preclude the Board, in the appropriate circumstances, from finding that contracts between purchasers of construction and contractors in the nature of the Contract form an appropriate basis for making a single employer declaration under subsection 1(4). Different facts might well lead the Board to the conclusion that a contractor had acquired work protected by a subcontracting clause, had circumvented its subcontracting obligation by entering into a scheme to have the purchaser award the work and that a one employer declaration should issue as relief to the offended trade union.

44. In summary, in the circumstances of these applications and for the reasons given above, the Board finds that Dalton Engineering & Construction Limited has not violated clause 2.05 of

the Labourers Provincial Agreement which was in effect from June 25, 1986 until April 30, 1988, and the Board declines to exercise its discretion pursuant to subsection 1(4) of the *Labour Relations Act* to declare Rumble Pontiac Buick (1985) Inc., and Dalton Engineering & Construction Limited to be treated as one employer for purposes of the Act. Therefore, these applications are dismissed.

DECISION OF BOARD MEMBER H. KOBRYN; June 30, 1988

1. The facts as presented are not in dispute. The Board had meticulously noted the arguments put forward by both sides and took a lengthy time to study these arguments thoroughly. Then the Board agonized over the various conclusions that were possible to attain given the undisputed facts.
2. Further, in the interest of promoting and maintaining stability in the construction industry in this province, through provincial bargaining, wherein wages, fringe benefits and working conditions will be uniform for all contractors bidding for construction work in this province, the only difference that should exist between bidding contractors would be their varying degree of experience, skill and ability to perform the bid work efficiently. This is achieved when the experienced contractors plan and schedule their work in a professional manner in order to fully utilize his skilled work force, equipment and building materials. Also schedules all his subcontractors in the same professional manner. Together with his bidding experience, this should secure for him his share of the work available.
3. This decision as written and accepted by the majority would return the construction industry in the I.C.I. sector back to the world of jungle warfare, of the dog eat dog world of the distant past. This would definitely injure our fair minded contractors who do not play this bidding game with the owner-clients in order to avoid using unionized subcontractors with their unionized work force at the insistence of the owner-client, as was the case here. This avoidance of using unionized subcontractors would have a definite advantage over the fair minded contractors in this bidding war. In turn, if our fair minded contractors are injured by these tactics and are unable to secure work for their unionized skilled work force, then all the affected building construction trade unions and their members are also hurt, wherein, their work opportunities will be diminished and eventually could disappear if this is allowed to continue unchecked.
4. My dissent will deal with two conclusions: (1) that Dalton and Rumble should under subsection 1(4) of the Act be treated as one employer for the purposes of the Act and that Dalton/Rumble as one employer would be in breach of clause 2.05 of the agreement, and (2) that Dalton as a unionized general contractor engaged ABC for the demolition work in violation of clause 2.05 of the Agreement.
5. I have reviewed and weighed counsels' very able submissions, but am neither going to set them out in full nor attempt a comprehensive summary of them. I will refer instead to particular aspects of their submissions as required by my dissent. While these are two applications made under separate sections of the Act, the Union has made them for a single purpose; that is, to attempt to preserve its bargaining rights contained in the Agreement by preserving for its members the work covered by the Agreement. The subcontracting provisions in clause 2.05, on which Local 506 is seeking to found its grievance, have the purpose of preserving to members of Local 506 work covered by the Agreement. Clause 2.05 provides that:

[t]he Employer agrees to engage only sub-contractors who are in contractual relations with the

Union and/or its affiliated bargaining agents for *all work covered by this Agreement*, or work forming part of an I.C.I. General Contract,...

[emphasis added]

The Union has joined Rumble as a party to its grievance, but Rumble is not bound to the Agreement and obviously cannot be found independently liable for a breach of it. That is the reason why Local 506 has pleaded subsection 1(4) of the Act. It wants Rumble and Dalton to be treated as constituting one employer for purposes of the Act so that Rumble would be bound to the Agreement and Rumble/Dalton as one employer would be in breach of clause 2.05 because of the engaging of ABC to perform the demolition work. Union counsel argued subsection 1(4) in the alternative. I will deal first with the issues raised in the application under subsection 1(4). It provides as follows:

(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

As applicant counsel pointed out, the Board has found that those words give it the discretion to declare that two or more entities be treated as constituting one employer for purposes of the Act if three preconditions exist. In this respect he referred to the Board's description of the conditions in its decision in *Donald A. Foley Limited*, [1980] OLRB Rep. April 436, at paragraph 17:

17. Subsection 1(4) of the Act grants discretion to the Board to treat two or more entities as though they constitute one employer for the purpose of the Act if:

- (a) more than one corporation, firm individual, association or syndicate is involved;
- (b) the entities are engaged in associated or related businesses or activities, whether or not simultaneously; and
- (c) the entities are under common control or direction.

...

6. It is a given fact that the first condition has been satisfied, Dalton and Rumble are separate entities. With respect to the second condition, Dalton's principal business or activity is construction; Rumble's is operating a General Motors automobile dealership. Those are not associated or related businesses or activities. The Board's decisions have made it clear, however, that "associated or related activities or businesses" do not have to be the only activities or businesses carried on by the entities for whom a one employer declaration is sought (*Brantwood Manor Nursing Homes Limited*), [1986] OLRB Rep. Jan. 9, at paragraph 105), and, as those words are employed in subsection 1(4), they are to be liberally construed and are not to be applied solely to the principal businesses or activities of the entities. In *Elmont Construction Limited and Bruce N. Huntley Contracting Limited*, [1974] OLRB Rep. June 341, the Board found Elmont and Huntley to be carrying on associated or related activities or businesses even though they were "readily distinguishable on the basis of their "main purposes" and "chief businesses". The Board found the "...common meeting ground [of the businesses to be] in the area of construction...". It also found the construction element of their businesses to be the "...precise point that the issue before the Board with respect to section 1(4) arises.". Elmont's main purpose or business was that of a building contractor, while Huntley's was the purchase of land on which it erected buildings and derived income from their rent. The Board found those to be associated or related businesses or activities

and ultimately declared that Elmont and Huntley be treated as constituting one employer. The Divisional Court dismissed an application for judicial review, holding the Board to have acted within its jurisdiction in making that declaration "...for the purposes of that related activity, *however minor it may be in the totality of the activities of the companies concerned.*" [emphasis added]. *Elmont Construction Limited and Bruce N. Huntley Contracting Limited v. Toronto Building and Construction Trades Council et al.*, 75 CLLC ¶14,270 at p. 528.

7. Twelve years later in *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720, at paragraph 20 the Board relied on and cited with approval the *Elmont* decision for the proposition that the related activity need not be the employers' main or principal business concern:

20. Given the remedial thrust of section 1(4) and the broad language chosen by the Legislature ("associated" or "related", "activities" or "businesses"), it is apparent that the section was intended to apply to a wide variety of commercial activities, even when an employer's main or principal business concern may be something else. That was the opinion of the Board in *Elmont Construction Limited*, [1974] OLRB Rep. June 342 (application for judicial review dismissed, *sub nomine, Elmont Construct Limited and Bruce Huntley Contracting Limited v. Toronto Building and Construction Trades Council et al.*, 75 CLLC ¶14,270), and it is one with which we respectfully agree...

Plastina Investments was a concrete and drain contractor in a collective bargaining relationship with two unions. The second company, Sherwood, was the developer of a housing subdivision and contracted out all construction work on the subdivision. Plastina Investments was one of its sub-contractors. The Board found those to be related activities under subsection 1(4) of the Act.

8. Counsel for the respondents contends that Dalton and Rumble cannot be seen to carry on associated or related businesses. One is a construction contractor and the other an automobile dealer who have come together as strangers in a temporal, contractual relationship. In this respect, counsel points to the indicia of businesses being related within the meaning of subsection 1(4) described in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, at paragraph 15:

...The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be "related" within the meaning of section 1(4) even though their activities are carried on through different or [sic] corporate vehicles...

Counsel refers the Board as well to its decision in *Arbis Construction Ltd.*, [1983] OLRB Rep. Dec. 1959, at paragraph 14, in which the Board relied on the Brant criteria in considering the nature of the business activities of two entities in order to answer the question of whether they were "associated or related". One had been a property developer and small general contractor but had become insolvent and inactive. The other was a masonry contractor which the Board found to represent "...a new business disassociated from [the insolvent one]". In applying the *Brant Erecting* criteria, the Board found the two entities to be "...neither of the same character nor serve the same market".

9. It does appear that what the Board had to say about whether "...associated or related activities or businesses are carried on..." in the *Brant Erecting* and *Arbis* decisions is somewhat at odds with what it said earlier in *Elmont* and later in *Plastina*. Insofar as that apparent conflict relates to the instant case, however, the Board's focus in *Arbis* seems to have been on the businesses of the two entities, rather than their activities, which is the focus in this case. Moreover, the Board in *Arbis* had already concluded that the two entities were not under common control or direction. That conclusion alone deprived the Board of the discretion to treat the two entities as

one employer, so it was unnecessary for the disposition of the application to decide whether the entities carried on associated or related activities or businesses. With respect to the indicia set out in *Brant Erecting*, in my view, they are not exhaustive of conditions which point towards activities or businesses being associated or related. Nor are they to be taken as criteria all, or any one or more, of which must be met for two businesses or activities to be associated or related. As the Board observed in *Brantwood, supra*, at paragraph 105, “[t]he focus of subsection 1(4) is on circumstances ‘[w]here, in the opinion of the Board, associated or related activities or businesses are carried on...’ by two or more entities.”. [emphasis added]. A fair reading of Board decisions which have preceded and followed *Brant Erecting* in time reveal that, in forming an opinion as to whether associated or related activities or businesses are being carried on, the Board has not limited itself to particular combinations of indicia. Rather, in keeping with the legislative intention that subsection 1(4) apply to a wide variety of commercial activities (see *Brant Erecting, supra*), the Board has formed its opinion on the particular blend of facts in each case.

10. In the case at hand, Dalton and Rumble have been brought together by the Contract for the purpose of planning and constructing the Project. In keeping with that purpose, through Wood, Rumble engaged directly in the pre-construction and construction activities described at paragraph 22 above, selected the trade contractors who were to be awarded the contracts, awarded the contracts and executed them, much as a general contractor would, and engaged Dalton to supervise the performance of the contracts for it as well as to carry out some of the site construction work. Dalton performed those responsibilities much as a general contractor would. In other words, Dalton and Rumble shared in planning, developing and performing the Project, including controlling its costs, all pursuant to their respective responsibilities under the Contract and in keeping with Dalton’s initial proposal to make Rumble, together with Dalton, an integral part of the project management team. Clearly, both Dalton and Rumble have engaged in construction activities in their performance of the Project. In my opinion, those are associated or related activities within the meaning of subsection 1(4) of the Act.

11. I turn next to the third precondition, that is, whether Dalton and Rumble were under common control or direction in carrying on their associated or related activities. Union counsel argues that the Board’s jurisprudence establishes four principles for determining if common control or direction exists between two or more entities. A summary of his argument in this respect, and some of the legal authorities on which he relies follows.

12. First, two entities can be under common control or direction without sharing common owners, shareholders, directors and officers. These indicia of common control or direction can be totally absent, but the Board will still examine the contractual and economic arrangements between them to see if their functional interdependence shows them to be under common control or direction. (*Donald A. Foley Limited, supra*, at paragraph 20.)

13. Second, the wording of subsection 1(4) shows that the Legislature intended that the Board assess the meaning to be given to “common control or direction” and that it not be limited to circumstances of common corporate ownership or other forms of corporate relationships (see *McCollum Graphics Incorporated*, [1986] OLRB Rep. Jan. 131, at paragraph 21, and *Brantwood Manor Nursing Homes Limited*, [1986] OLRB Rep. Jan. 9, at paragraph 93 and 94). In *McCollum*, the Board stated that “...two corporations can be under common direction even though legally owned by different individuals.”. Approximately three weeks later, the Board in *Brantwood* concurred in that view when, after having observed at paragraph 93 “...that the ‘common direction or control’ on which subsection 1(4) focuses is direction and control over businesses or activities, which may include control over employees but need not require it...”, the Board concluded at paragraph 94 that the Board’s discretion to make a one employer declaration was not confined to

circumstances where the connection between entities "...is a relationship by blood, marriage, degrees of corporate ownership or a combination of these." Counsel argues that these cases demonstrate that common direction does not need to be exercised with respect to corporate relationships in order to satisfy subsection 1(4), it is sufficient that there be common control over their related activities. In this respect, he relies on *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931, at paragraph 53, wherein the Board rejected the proposition that subsection 1(4) "...must be interpreted as requiring common direction of the corporate entities..." which were the respondents to the applications and rejected as well the associated proposition "...that the question of whether the specific activities carried on by these entities are under common control or direction is not critical to a subsection 1(4) determination.":

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We reject the suggestion that the section must be interpreted as requiring common control or direction of the corporate entities (Drake and Kennedy Lodge in this case) and that the question of whether the specific activities carried on by these entities are under common control or direction is not critical to a subsection 1(4) determination. The plain language of the section, which speaks in terms of 'activities or businesses' evidences a contrary legislative intention and furthermore, in that it is specific activities that give rise to employment, the purpose of the section would not be well served by such an interpretation. The Board made it clear in *J.H. Normick Inc.*, *supra*, that the common control and direction referred to in the section relate to activities as well as businesses and that functional interdependence as well as corporate interrelationships must be considered.

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[emphasis added]

14. Third, the Board's jurisprudence makes it clear that common control or direction can be found where the basis of the relationship between the entities is a joint venture or where they are sharing in a commercial activity. That principle, according to counsel, flows from the Board's decision in *Kennedy Lodge*, *supra*, *Brantwood Manor*, *supra*, particularly at paragraph 99, and *J.D.S. Investments Limited*, [1981] OLRB Rep. Mar. 294, at paragraphs 16 and 17. Counsel views *J.D.S. Investments* as being generally similar to the instant case in the facts of the relationships involved. Counsel emphasizes that the Board was prepared, on the basis of a single project joint venture, to find the two respondents in the case to be engaged in associated or related activities (paragraph 15) and then went on to conclude that they were under common control and direction based on the way they shared responsibility for the project (paragraph 16 and 17).

15. Fourth, the Board's decisions in *Foley Limited*, *Kennedy Lodge* and *Brantwood Manor*, *supra*, stand for the principle that common control or direction can be found between two entities which are in a contracting relationship, in other words as contractor and subcontractor or as owner (Rumble) and contractor (Dalton), as does *J.H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176. In that case, Normick had let certain tree cutting work to another person whom the Board assumed, without finding, was not part of the Normick organization. In the process of finding that they were under common control or direction, the Board observed at paragraph 21 that subsection 1(4) recognizes business activities giving rise to employment relationships can be carried on through a variety of legal arrangements and that "...the broad language of the section extends to cover...a wide range of business relationships".

16. In summary, counsel argues that those legal principles constitute a legal framework which recognizes that common control or direction of two or more entities can exist or be found in four quite different circumstances:

- (1) where there is no common ownership, directors, officers or shareholders;
- (2) where the control or direction is exercised over activities and not over corporate entities or relationships;
- (3) where the entities are engaged in a joint venture or are sharing in a commercial activity; and
- (4) where the parties are in a contracting relationship; for example, as contractor and subcontractor or owner and contractor.

That legal framework applied to the facts of this case, applicant counsel submits, establishes that Dalton and Rumble shared control or direction of the Project because of the close interrelationship of their roles respecting the Project.

17. The four circumstances are identifiable in the Board's decisions on which Union counsel has relied. They are ones in which the Board did find the entities in question, and/or their activities or businesses, to be under common control or direction. They are also cases in which the Board ultimately found that it had the discretion to declare they be treated as constituting one employer for purposes of the Act, and so declared. The factual basis on which the Board made its findings of interdependency of the entities in those cases, particularly respecting the activities to which the bargaining rights were attached, bear no similarity to the instant case. Without cataloguing all of the factual differences between those cases and this one, it is clearly distinguished on its facts from those decisions and I do not rely on them to find Dalton and Rumble to be under common control or direction. For example, in *Foley Limited*, *supra*, the decision on which counsel relied for the first point of his legal framework, the Board found that the non-union subcontractor was so bound up in the business of the unionized contractor (Foley) that the subcontractor had no economic life of its own or no control over its own fortunes. Similarly, in *Kennedy Lodge and Normick*, upon which, together with *Foley Limited*, counsel relies for the fourth point, the Board found that the unionized contracting party in each case (Kennedy and Normick) had contracted work to which bargaining rights attached to apparently independent, non-union subcontractors without giving up real control over the work. In *J.D.S. Investments*, the principals of J.D.S. and Martin Ross Construction became partners in a joint venture project. Martin Ross Construction had no collective bargaining relationships. J.D.S. was bound to the Carpenters provincial agreement. While Martin Ross Construction was the nominal general contractor on the project, personnel of J.D.S. performed duties on the project normally performed by a general contractor. The Board relied on those facts to conclude that J.D.S. and Martin Ross Construction were carrying on associated or related activities (the joint venture project of their principals) and, because the construction activities of Martin Ross Construction were being carried on by J.D.S. personnel, the Board concluded also that the related activities were being carried on under common control or direction.

18. That does not end the matter, however. It remains to answer the question of whether the Project is under the "common control or direction" of Dalton and Rumble, as those words are used in subsection 1(4) of the Act. Moreover, the question must be answered on the unique facts of this case. Dalton and Rumble, in the ordinary sense, are owned, directed and controlled completely independently of each other. But, as the Board observed in *Brantwood*, *supra*, at paragraph 104:

The right or power to exercise control or direction over the activities of a legal entity can arise as easily from the terms of a contract as from the legal incidents of ownership. The language of subsection 1(4) does not distinguish among the means by or through which direction or control

may arise or be exercised. We are satisfied that "common control or direction" as contemplated by subsection 1(4) can be the result of a contractual relationship even if there is no other connection between the parties to that relationship.

Thus, for common control or direction to be found between Dalton and Rumble, it must be found in the control or direction which they shared for the Project as evidenced by the Contract and the manner in which they carried out its terms, particularly as they relate to the work to which the bargaining rights attach. That work is the demolition work let by Rumble to ABC.

19. Dalton prepared the bid specifications for the demolition work, selected the contractors who would be invited to bid, prepared and issued the invitations to bid, and arranged for the tenders to be submitted to Rumble. Wood selected the lowest bidder, ABC, and directed Dalton to prepare a contract with ABC for execution by Rumble. Rumble executed the contract. Dalton supervised ABC's work, approved its invoices for payment by Rumble and disbursed payments to ABC on Rumble's behalf. The manner in which Wood selected ABC for the demolition work and had Rumble enter into a contract with it is similar to Wood's selection of Keith Plumbing for the plumbing and drainage work and consistent with the way he unilaterally let contracts between Rumble, Electriclee and Tomas. Wood's actions leave no doubt that, in addition to signing the 27 written contracts executed by Rumble with trade contractors, he controlled for Rumble the selection of the contractors whether or not they were recommended by Dalton, although it is reasonable to infer from all of the evidence that Rumble accepted Dalton's recommendations for awarding the other 25 contracts. Once contracts were executed, Dalton exercised primary control over everything else from scheduling when work under a particular contract would commence through to the approval of and payment for completed work. Wood, for Rumble, also exercised a degree of control over the performance of the trade contracts by meeting thrice weekly with Gillam, attending the weekly job meetings between Dalton and the trade contractors and by visiting the Project daily. During these visits he met with Dalton's site superintendent and, when Wood deemed it expedient, he dealt directly with the trade contractors to correct or change work which was not acceptable to him, whether or not Dalton had approved it. That is not to say, however, that Dalton was not responsible for the rate and quality with which construction progressed. There is no evidence that Wood had the construction expertise to evaluate the work beyond its physical appearance. Rumble was dependent on Dalton's expertise for that aspect of the Project. That was one of the reasons why Rumble got Dalton to agree to warrant the trade contractors' work. The pre-construction services described in items 1 to 4 of paragraph 14 provided by Dalton and Rumble's pre-construction activities described at paragraph 22 are further incidents of their shared control or direction of the Project. On those facts, I find that the construction activities in which Dalton and Rumble engaged while performing the Project, including those specifically involved with the demolition work performed by ABC, were under the common control of Dalton and Rumble.

20. Accordingly, in my opinion, with respect to the Project, Dalton and Rumble carried on associated or related activities under common control or direction within the meaning of subsection 1(4) of the Act. That establishes the discretion to treat them as constituting one employer for purposes of the Act and it remains only to decide whether the declaration should be made in the circumstances at hand.

21. Counsel for Local 506 submits that, on the facts of this case, the conduct of Dalton and Rumble has resulted in the erosion of Local 506's bargaining rights. The erosion occurred when Rumble let the demolition contract to ABC and not to one of the other two bidders who were bound to the Agreement. As a result of the demolition contract going to ABC, Local 506 members did not get the work even though the Agreement requires Dalton to engage only contractors who are in contractual relations with Local 506 or one of its affiliated bargaining agents. The very reason for that requirement, according to counsel, is to preserve to the Union's members the work on

which its bargaining rights are founded. Thus the protection intended by that requirement was frustrated by Dalton entering into a contract with Rumble providing for Rumble and not Dalton to let the trade contracts. That consequence of their contractual relationship is precisely what subsection 1(4) is intended to protect against. Therefore, counsel submits, the Board should exercise its discretion under the subsection to declare them to constitute one employer for purposes of the Act. Counsel argues that a “single employer” declaration would be the appropriate exercise of the Board’s discretion whether or not Dalton and Rumble intended that ABC get the demolition contract. It is even more appropriate in this case because, when Dalton and Rumble entered into a contract providing for Rumble and not Dalton to let the trade contracts so that Rumble could engage non-union contractors, they had in mind the purpose of avoiding Dalton’s subcontracting obligations under the Agreement. It was also the first time for Dalton that work covered by any of its collective agreements was let “non-union” under a construction management contract, whether or not the trade contracts had been let by Dalton or its clients. That arrangement worked to the detriment of the Union’s bargaining rights and to allow such arrangements would mean that any contractor bound by the subcontracting clause would be able to avoid its obligations by contracting as a construction manager and having its client let the contracts. Therefore, counsel argues, the Board should exercise its subsection 1(4) discretion and declare as constituting one employer parties to schemes, like the one created by the contractual relations between Dalton and Rumble, which circumvent subcontracting obligations by having a third party let contracts.

22. Counsel for Dalton and Rumble takes the position that the Board should not make a “single employer” declaration because a declaration is not warranted by the circumstances and, should the Board disagree with him, because of the consequences to business generally and the construction industry in particular of making a declaration in the context of this application.

23. Counsel submits that none of the purposes which subsection 1(4) is intended to serve arise on the facts of this case. In particular, there has been no erosion or dilution of the Labourers’ bargaining rights respecting Dalton because the relationship between Dalton and Rumble is a “once only” relationship under a construction contract. The demolition work at issue herein belonged to Rumble. Rumble has no collective bargaining obligation to the applicant, or for that matter to anyone else. Rumble contracted with Dalton to supervise the performance of the work by a third party to whom Rumble had contracted it. That, counsel contends, is quite unlike *Brantwood* or *Kennedy*, *supra*, where the owner had collective bargaining obligations and sought to avoid them totally by contracting the underlying work to another party without relinquishing control over the work. Nor is it like the type of case where an owner under collective bargaining obligations transfers work and control over it to another party.

24. Moreover, counsel argues, it was clear from Wood’s evidence that, had Dalton not been prepared to have Rumble let the trade contracts in its own name, the Labourers’ members who were directly employed by Dalton would not have had any work on the project. Nor would the members of the building trades unions who were employed by other trade contractors with whom Dalton was successful in persuading Rumble to contract for Project work.

25. The consequences for businesses of issuing a declaration in the context of this case would be several, counsel submits. It would operate to hamper the businesses of third parties never intended to be captured by subsection 1(4). In the construction industry in general, it would limit owners without any collective bargaining obligation whatsoever from choosing how they want to conduct their businesses. In the industrial, commercial and institutional sector of the construction industry, it would result in major purchasers of construction becoming bound to the provincial agreements with the effect that a building developer or bank, for example, doing renovating or

decorating work on one of its properties would be bound by the subcontracting provisions of those agreements.

26. Subsection 1(4) gives the Board discretion to treat two or more entities as constituting one employer for purposes of the Act without offering any express limitation or guidance to the exercise of that discretion. Nor is there any express guidance to be found elsewhere in the Act, beyond the broad policy statement of the Act's preamble. For that reason, the Board has developed its own guidelines through its case by case application of the subsection based on the labour relations policy objectives underlying the language of the subsection. In other words, the Board looks to the labour relations policy or purpose which would be served were it to exercise its discretion to issue a "one employer" declaration.

27. One policy objective of subsection 1(4) is to prevent the erosion or frustration of bargaining rights already obtained. Union counsel contends that there has been an erosion of Local 506's bargaining rights because of the loss to its members of the demolition work which was performed by ABC. Bargaining rights attach to work, as the Board has observed frequently in its decisions under the subsection and under section 63 which complements subsection 1(4) by preserving bargaining rights when a business, or part thereof, is transferred from one employer to another. See *Brant Erecting, supra*, at paragraph 12. The parties to the Agreement also have recognized that bargaining rights are attached to work, as witnessed by the emphasized words "...all work covered by this Agreement..." in clause 2.05 quoted above at paragraph 5.

28. The Board has long recognized subcontracting provisions in construction industry collective agreements to be a significant union security protection. The Board's decision in *Brant County Board of Education*, [1986] OLRB Rep. Sept. 1187, at paragraph 6, describes succinctly the purpose of such provisions:

The very origin of the subcontracting clause is to prevent an employer bound by a collective agreement from avoiding that collective agreement by contracting out the work rather than performing the work with its own employees. Such clauses have been regarded by this Board (see, *The Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022) as valid "union security" provisions in that they attempt to protect a legitimate concern of the trade union, i.e. rendering bargaining rights meaningless by subcontracting. The impact of the clause then is to say to the employer "you don't have any employees in the construction industry but you ought to have our members working on the job and therefore you have violated our collective agreement.".

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In the *Metropolitan Toronto Apartment Builders Association* decision referred to in the quotation from *Brant County*, the Board concurred with the views of other labour relations jurisdictions in Canada and the courts that "...the primary purpose of the subcontracting clause is to protect a union's claim to a particular work jurisdiction." (paragraph 39) and further, that such provisions do not violate any provision of the *Labour Relations Act* (paragraph 41). Earlier in the decision, at paragraph 35, the Board had contrasted union security provisions in industrial settings and in the construction industry and observed that, in the construction industry, "...union security appears to be more related to contractual provisions recognizing the union's claim to particular work.".

29. In that respect, it is instructive to examine the locus of clause 2.05 in the Agreement. It is part of Article 2 - Union Security, Work Jurisdiction, Assignment of Work, Subcontracting. Clause 2.01 commits Dalton to employ only members in good standing of the Union or its affiliates "...for work covered by the Agreement.". In clause 2.03 Dalton "...acknowledges and agrees that the work covered by this Agreement is within the exclusive jurisdiction of the Union...notwithstanding

ing the claim of any other Trade Union.”. Further, in clause 2.04, Dalton agrees that “..., it shall assign exclusively to members of the Union...*all of the work covered by this Agreement.*” notwithstanding the claims of any other trade union. The attempt to secure the “work covered by the Agreement” to the members of the Union is continued in Article 3 - Hiring of Employees. Clause 3.01 obligates Dalton to obtain its employees for work under the Agreement by referral from the Union. If the Union cannot supply employees within the stipulated time limit, Dalton is free to find its own supply, but anyone it hires must either be or become a member. Finally, clause 2.06 operates in conjunction with Article 8 - Jurisdictional Disputes to attempt to safeguard the Union’s claimed work when its claim is challenged by another trade union.

30. Those clauses, read together, demonstrate that the Union has successfully bargained safeguards for work covered by the Agreement to assure that, when an employer like Dalton who is bound to the Agreement acquires work which is covered by it, the work will be done by the Union’s members. To put it another way, the Union has bargained successfully to secure work opportunities for its members. A contractor bound by the Agreement acquires work by entering into a commercial contract with a purchaser of construction for the performance of work covered by the Agreement. The contract can take the form of oral agreement on the terms for a performance of the work and a handshake, a purchase order or a more complex and extensive document or series of documents like the Contract.

31. The parties agree that the demolition work performed by ABC was work covered by the Agreement. It was also work covered by the Contract. Thus Dalton had acquired work covered by the Agreement, although what it acquired did not include either the direct performance of the work or the awarding of its performance to another contractor. The latter task fell to Rumble pursuant to Article 40 of the General Conditions of the Contract and Rumble awarded the direct performance of the work to ABC. Dalton acquired through the Contract, and carried out, all of the other work associated with ABC’s demolition contract, excluding recommending to Rumble the awarding of the contract to ABC. Dalton applied its construction expertise to organize the work for bid tendering, identify the contractors who would be invited to tender bids, prepare the bid specifications and invitations to bid, evaluate the tenders received, prepare the contract documents for execution, schedule, co-ordinate and supervise the contractor’s performance of the work, approve the work for payment and arrange payment. In short, with respect to the demolition work and all of the work covered by the Contract, Dalton performed all of the services which it has usually done whenever it acquires work covered by the Agreement or its other collective agreements, except awarding and executing the formal contracts with the trade contractors.

32. Dalton knew, when it accepted the Contract with the condition in it that Rumble would award the trade contracts, and that the work covered by the six provincial agreements to which it was bound would likely be let to contractors not bound by them. That risk was realized respecting the Agreement when the demolition work was awarded to ABC. As a result of that award, the members of Local 506 suffered a loss of work opportunity with respect to work covered by the Agreement and work to which the protection of the clauses discussed in paragraph 29 applies. Dalton is bound by those clauses as well and, when it acquires work covered by the Agreement, Dalton is bound by those clauses to make sure that those protections are fulfilled; that is, to make sure that members of Local 506 do the work.

33. Thus, by entering into a commercial arrangement with Rumble providing for Rumble to award and execute the trade contracts with the result that the demolition work was performed by ABC, Dalton has caused the erosion of work opportunities for Local 506 members. That has operated to the detriment of its bargaining rights. The Contract clearly was an arrangement between Dalton and Rumble to enable Rumble to use Dalton’s construction expertise and still avoid having

union construction forces on the Project. Those circumstances make this an appropriate case in which to treat Dalton and Rumble as constituting one employer for purposes of the Act.

34. In this member's view, to argue that the work was Rumble's to award, and not Dalton's, is not a deterrent to making a one employer declaration. Before entering into the Contract with Dalton, Rumble was not under any statutory or contractual prohibition from seeking to have the Project performed non-union, whatever the reasons. It was free also to choose whether to proceed by hiring its own tradesmen or contract the work so as to be performed by the employees of another employer. However, for the reasons described at paragraph 12 of the majority decision, Rumble chose to enter into an arrangement with Dalton. That arrangement allowed Rumble to retain control over the awarding of the work to the trade contractors, but once awarded, Rumble had relinquished control over its performance. Moreover, Rumble contracted to Dalton all of the other construction services essential to assuring the proper performance of the work covered by the trade contracts. The Contract (with Dalton) also committed Rumble to bind all of the trade contractors to the contract documents between Dalton and Rumble to the extent that they were applicable to the work covered by the trade contracts. Therefore, by virtue of the trade contracts and the Contract, Rumble has relinquished independent control of the work and the terms of the Contract and the trade contracts will determine its performance.

35. The Contract divided between Dalton and Rumble the construction functions that Dalton commonly has performed when it has taken contracts which include work covered by the Agreement. In so doing, Dalton put itself in a position where, having acquired work covered by the Agreement, it could not meet its obligation under the Agreement to assure that the work was done by the Union's members. In other words, Dalton has failed to protect the members' work opportunities which it is committed by the Agreement to protect. In my view, a one employer declaration in these circumstances would serve the labour relations purpose of causing Dalton to conduct the commercial elements of its construction business so that, when it acquires work covered by the Agreement, it meets its obligations under those clauses of the Agreement which are there to assure that the Union's members will have the opportunity to perform the work. I particularly disagree with the view of the majority expressed at paragraph 41 that, to make such a declaration, "...would have the effect of giving the parties to the Agreement a result which they failed to negotiate and would be analogous to the Board using its discretionary powers under subsection 1(4) to extend bargaining rights.". The Union was not trying to extend bargaining rights. On the contrary, it was only trying to preserve to its members the work on which its bargaining rights are founded. It is not surprising why the Union found it necessary to do so when you take into account Wood's reasons for wanting Rumble and *not* Dalton to let the contracts directly to the trade contractors. The majority decision at paragraph 12 outlines his reasons in the following terms:

This was because Wood wanted to have as much control as possible over how things were done on the Project and he did not want unionized contractors to be used on the Project. Wood told the Board that he had no use for unions and believed that their presence on the Project would compromise his objective of Rumble getting the best price, productivity and quality. He believed also that Dalton would be obligated to engage union contractors.

Subsection 1(4) is intended precisely to protect against such mischief and that mischief did result as a consequence of the contractual relationship between Dalton and Rumble. Accordingly, this member of the Board would have declared that Dalton Engineering & Construction Limited and Rumble Pontiac Buick (1985) Inc. be treated as constituting one employer for purposes of the *Labour Relations Act*, to take effect from when they began to perform the Project pursuant to the Contract.

36. In the result, I would have found that Rumble is bound together with Dalton to the

Agreement and, in particular, to clause 2.05 which requires Dalton/Rumble "...to engage only sub-contractors who are in contractual relations with the Union and or its affiliated bargaining agents for all work covered by this Agreement,...". The work awarded to A.B.C Demolition was work covered by the Agreement. A.B.C Demolition was not in contractual relations with Local 506 or any of its affiliated bargaining agents. Therefore, by awarding the work to and having it performed by A.B.C Demolition, in my view, Dalton/Rumble has violated clause 2.05 of the Labourers Provincial Agreement effective from June 25, 1986 to April 30, 1988.

37. The above completes the subsection 1(4) conclusion and now I will deal with the second conclusion of deciding whether Dalton engaged ABC for the demolition work in violation of clause 2.05 of the Agreement quoted at paragraph 5 of this dissent.

38. As I have commented at paragraph 28, the Board long has recognized provisions in construction industry collective agreements like clause 2.05 of the Agreement to be significant union security provisions. The Board also has found that such provisions do not violate any section of the Act. In the words of the *Brant County Board of Education* decision quoted in that paragraph, clause 2.05 seeks to protect Local 506's bargaining rights by avoiding having them rendered meaningless by subcontracting the work on which they are founded to a contractor who is not obligated to employ members of Local 506, or its affiliated bargaining agents to perform the work. Furthermore, as paragraph 29 demonstrates, the place of clause 2.05 in the Agreement shows it to be an integral part of broad union security provisions, all of which focus on preserving to members of the Union work coming within the Agreement's scope.

39. The language of clause 2.05 commits employers like Dalton who are bound to the Agreement to "...engage only subcontractors who are in contractual relations with [Local 506] for all work covered by [the Agreement], or work forming part of an I.C.I. General Contract...". Dalton was fully aware of this commitment when it accepted the Contract with the condition that Rumble would award the trade contracts. Dalton knew also that work covered by the Agreement likely would be let to contractors not bound by the Agreement and that Dalton would have the same responsibility to Rumble for the trade contractors' performance of the work as would have been the case had Dalton been responsible for executing the formal contracts with them.

40. That likelihood became reality with respect to the demolition work ultimately performed by ABC. Dalton prepared the bid specifications for the work, selected the contractors who would be invited to bid, prepared and issued the invitations to bid and arranged for the bid tenders to be submitted to Rumble. Wood selected ABC, the lowest bidder, and directed Dalton to prepare a contract with ABC for execution by Rumble. Wood executed the contract for Rumble. Dalton scheduled the work, supervised ABC's performance of it, approved ABC's invoices for payment by Rumble and disbursed payments to ABC on Rumble's behalf. Dalton warranted ABC's work for one year, as it did for the other trade contractors, making it independently liable for ABC's work. In short, the services which Dalton performed with respect to the demolition work included all of the services which it usually would have performed as an independent general contractor, except awarding and executing the contract.

41. It is obvious that Dalton and Rumble have structured an arrangement for constructing the Project under which Dalton did everything necessary to identify the trade contractors who would be engaged to carry out the construction work, but Rumble made the formal contracts with the trade contractors. Once a formal contract was executed, Dalton was responsible for making sure that the contractor performed the work in compliance with the contract's terms and, by approving and warranting the finished work, made itself independently liable to Rumble for the work. When Dalton entered into the arrangement, it was aware that it had a positive obligation

“...to engage only sub-contractors who are in contractual relations with [Local 506] for all work covered by this Agreement,...”. It is to be noted that the parties to the Agreement, in adopting that language, have not specified how the engaging is to be done. Having regard to the clear purpose of this type of clause in collective agreements and the place of clause 2.05 in the regime of union security in the Agreement, it is reasonable to construe the language broadly so as to prevent an employer from circumventing his obligation by such devices as delegating his “engaging” power to a third party or arranging with a third party to do the engaging for him. I am satisfied that the facts of this case, particularly those facts respecting Dalton’s responsibilities preparatory to and following upon the awarding of the trade contracts, including accepting independent liability for their finished work, support the conclusion that Dalton entered into an arrangement with Rumble, the effect of which had Rumble engaging the trade contractors on Dalton’s behalf. Therefore, when ABC was awarded the demolition work, the engaging of ABC was effectively Dalton’s.

42. In reaching that conclusion, I have not lost sight of the argument made by counsel for the respondents that Dalton could not have violated clause 2.05 on the facts of this case because, even if the facts were that Dalton had executed the formal contract with ABC, Dalton would have done so as Rumble’s agent. Even were we to assume that Dalton had contracted with Rumble to be its agent, that relationship would not shield Dalton from violating clause 2.05 when it executed the contract with ABC. In my view, when a party like Dalton having a contractual obligation to a second party, Local 506, enters into a contract with a third party, Rumble, which calls for Dalton to breach its prior obligation, it cannot then rely on its contract with the third party to escape the prior obligation and the consequences of its breach.

43. For all of the foregoing reasons, I would have found that Dalton Engineering & Construction Limited engaged A.B.C Demolition for work covered by the Labourers Provincial Agreement which was in effect from June 25, 1986 to April 30, 1988, contrary to the provisions of clause 2.05 of that agreement.

0454-88-U Grand Valley Construction Association (General Contractors Section), T. E. Taylor Construction Limited, XDG Limited, Complainants v. Labour Relations Bureau of the Ontario General Contractors Association; Ontario Masonry Contractors Association; Industrial Contractors Association of Canada; Water Proofing Contractors Association of Ontario; Concrete Floor Contractors Association of Ontario, James Thomson and Provincial Employer Bargaining Agency - Labourers, Respondents v. Labourers Employee Bargaining Agency, Intervener

Construction Industry - Duty of Fair Representation - Parties - Unfair Labour Practice - Constituent organization of the employer bargaining agency alleging breach of fair representation duty by employer bargaining agency - Duty owed to individual employers only - Employer organization not a proper complaint

BEFORE: Harry Freedman, Vice-Chair, and Board Members D. A. MacDonald and H. Kobryns.

APPEARANCES: Paul Young and Frank Sheppard for the complainants; Joseph Liberman for the Labour Relations Bureau of the Ontario General Contractors Association, James Thomson, and Provincial Employer Bargaining Agency - Labourers; no one appearing on behalf of Ontario

Masonry Contractors Association, Industrial Contractors Association of Canada, Water Proofing Contractors Association of Ontario, Concrete Floor Contractors Association of Ontario; *S. B. D. Wahl, J. Steffanini and E. Bairos* for the intervener.

DECISION OF THE BOARD; June 3, 1988

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a violation of section 151(2) of the Act. During the course of opening submissions, counsel for the complainants advised that the complainants are withdrawing this complaint against the respondent James Thomson. Therefore, in view of the request made by the complainants, this complaint is hereby withdrawn against the respondent James Thomson by leave of the Board.

2. The Board permitted the complainants to amend the complaint by adding the Provincial Employer Bargaining Agency - Labourers as a respondent to this proceeding. Counsel appearing on behalf of the Labour Relations Bureau of the Ontario General Contractors Association and James Thomson advised the Board that he was authorized to act on behalf of the Provincial Employer Bargaining Agency - Labourers.

3. Counsel for the complainant also sought to add T. E. Taylor Construction Limited and XDG Limited as complainants to this proceeding.

4. After hearing submissions from counsel with respect to certain preliminary matters raised by counsel for the respondents who appeared and counsel for the intervener, the Board delivered the following oral decision at its hearing in this matter on June 2nd, 1988:

This is a complaint alleging that the respondent, Provincial Employer Bargaining Agency - Labourers violated section 151(2) of the *Labour Relations Act* by the manner in which it came to agree to a Memorandum of Agreement with the intervener, Labourers Employee Bargaining Agency which contained the following provision:

“3(b)Schedule D

Schedule 'D' of the Provincial Agreement shall be amended effective April 29, 1990 by removing paragraph 2 therefrom dealing with Local 1081's area in order to provide for the uniform application of the sub-contracting provision contained in Article 2.05 of the Master Portion of the Provincial Agreement to all areas of the Province."

Counsel for the complainant Grand Valley Construction Association (General Contractors Section) sought to add as party complainants two contractors, T. E. Taylor Construction Limited and XDG Limited. The Board hereby permits the addition of those two employers as complainants.

Counsel for the intervener and counsel for the respondent Provincial Employer Bargaining Agency - Labourers have raised preliminary matters that relate to whether the complaint establishes a violation of the Act.

Section 151(2) states:

“A designated or accredited employer bargaining agency shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers in the provincial unit of employers for which it bargains, whether members of the designated or accredited employer bargaining agency or not.”

It is clear, in our view, that the duty owed under that section by the Provincial Employer Bargaining Agency - Labourers is a duty owed to individual employers. The province-wide bargaining provisions of the *Labour Relations Act* create, on the employer side, a bargaining structure in which employers are represented by an employer bargaining agency. How the employer bargaining agency constitutes itself is not explicitly governed by statute. While in this case the Provincial Employer Bargaining Agency - Labourers is comprised of five employers' organizations and those employers' organizations may be comprised of local trade or employer groups, section 151(2) imposes the statutory obligation on the employer bargaining agency, and not on its constituent organizations, to represent employers in a manner that is not arbitrary, discriminatory, or in bad faith.

The way in which the employer bargaining agency discharges that obligation is a matter that is properly before the Board when an employer represented by an employer bargaining agency complains about the manner in which it is represented by the employer bargaining agency.

In this case there are no facts pleaded which indicate how the two complainants, XDG Limited and T. E. Taylor Construction Limited have in any way been dealt with by the Provincial Employer Bargaining Agency - Labourers contrary to section 151(2) of the Act. The complaint alleges conduct by a constituent organization of the employer bargaining agency affecting the complainant Grand Valley Construction Association (General Contractors Section).

Counsel for the complainant relied on *Mechanical Contractors Association of Ontario*, [1982] OLRB Rep. Mar. 417 to submit that the Grand Valley Construction Association (General Contractors Section) may bring this complaint. In that case the complainant was the Mechanical Contractors Association of Sarnia. The Board wrote at paragraph 2, page 417 of that case:

“In *Dominion Maintenance Limited*, [1979] OLRB Rep. Oct. 940 at 950 the Board said that section 151(2) has the same purpose as section 68 which protects individual employees from arbitrary, discriminatory or bad faith treatment at the hands of a bargaining agent trade union. Section 151(2) protects *individual contractors against the same kind of conduct* and for that reason the jurisprudence of the Board in trade union fair representation cases is directly applicable to the facts and complaint before us in the instant matter.”

[emphasis added]

In granting relief, however, the Board wrote at paragraph 12, page 419:

“Having regard to the able submissions of counsel and the evidence before the Board, we find that the respondent has acted in an arbitrary manner by the MTBC [Mechanical Trade Bargaining Committee] failing to properly consult with the former zone affiliate with respect to the preparation, conduct, and progress of negotiations. It is our further view that only the granting of observer status in the affairs of the MTBC for the current round of negotiations will clearly avoid an ongoing violation of section 151(2). In coming to this conclusion we rely heavily on the fact that *the complainant is not an individual employer but rather an organization that formerly had the status of a zone affiliate*; the complainant in previous negotiations has played a fundamental and

pivotal role in the negotiation of the Sarnia appendix; and the fact that the Sarnia area has a number of labour relations problems that tend to be unique to that area."

[emphasis added]

It is clear from that decision that the issue of whether any duty is owed to an employers' organization, as opposed to an employer was not dealt with or considered by the Board in that case. This is therefore a matter of first impression before us.

There is nothing in the complaint as pleaded which alleges that T. E. Taylor Construction Limited or XDG Limited have been adversely affected by the conduct of the employer bargaining agency. Additionally, in our view, the Grand Valley Construction Association (General Contractors Section) is not owed any duty under the *Labour Relations Act* by the Provincial Employer Bargaining - Labourers since it is not an employer "in the provincial unit of employers" for which the Provincial Employer Bargaining Agency - Labourers bargains.

We are therefore persuaded that this complaint must be dismissed as it does not set out a violation of the *Labour Relations Act* in respect of any of the complainants.

We wish to make clear however that our dismissal at this stage of the proceeding is without prejudice to the complainants or any of them filing a further complaint alleging that an employer or employers have been dealt with by the Provincial Employer Bargaining Agency - Labourers contrary to section 151(2) of the Act.

0514-88-R The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, Applicant v. Heritage Mechanical Ltd., Respondent

Bargaining Unit - Certification - Construction Industry - Whether Board should issue a clarity note declaring that welders working in the plumbing and steamfitting trades are included in plumbers bargaining unit - Hearing directed to inquire into issue

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballantine*.

DECISION OF THE BOARD; June 16, 1988

1. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under clause (a) of section 139(1) of the Act on May 14, 1982, the designated employee bargaining agency is the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the

Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

2. This is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

3. In paragraph 7 of its application for certification herein, the applicant describes the unit of employees that it claims to be appropriate for collective bargaining as being:

all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman

and

all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in Board Geographic Area No. 8, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman.

In paragraph 10 of its application, the applicant requests that the Board issue a clarity note declaring that welders working in the plumbing and steamfitting trades are included in the bargaining unit.

4. The respondent has not filed a reply, a list of employees in the bargaining unit for which the applicant seeks to be certified, or any other material.

5. In circumstances such as these, the Board would normally proceed to process the application based on the material provided by the trade union. However, there are presently a number of applications for certification pending before the Board in which the employee bargaining agency referred to in paragraph 1 herein or one of its affiliated bargaining agents seeks to be certified for a bargaining unit of employees described in substantially the same terms as the unit sought by the applicant herein together with the same welders clarity note sought by the applicant, and an issue has arisen with respect to, among other things, the appropriateness of the clarity note.

6. In that regard, we observe that the trades of "plumber" and "steamfitter" are compulsory certified trades under the *Apprenticeship and Tradesmen's Qualification Act*, R.S.O. 1980,

Chapter 24. In addition, the designation referred to in paragraph 1 herein designates the employee bargaining agency of which the applicant is an affiliated bargaining agent to represent in bargaining all "Journeymen and Apprentice, Plumbers, Pipefitters" represented by its affiliated bargaining agents. In previous cases, the Board has observed that the designations issued pursuant to section 139(1)(a) of the *Labour Relations Act* describe the provincial units of employees contemplated by the province-wide collective bargaining scheme established by the Act for the industrial, commercial and institutional ("ICI") sector of the construction industry and designate, for each such unit, an employee bargaining agency (see, *Orocon Inc.*, unreported decision of the Board dated January 5, 1988). The Board has also observed that, in the ICI sector, the employee bargaining agency and their affiliated bargaining agents can only represent employees in a trade which they have been designated to represent (see, *Superior Plumbing and Heating Ltd.*, [1986] OLRB Rep. Nov. 1589; *D. E. Whitmer Plumbing and Heating Limited*, [1987] OLRB Rep. Oct. 1228).

7. Finally, the Board has, in other cases, concluded that, where an applicant for certification is a construction trade union designated to represent, in bargaining, persons in a compulsory certified trade within the meaning of the *Apprenticeship and Tradesmen's Qualification Act*, it is appropriate to describe the bargaining unit in terms of the journeymen and registered apprentices of the trade, and to include in such bargaining units only employees who are either such journeymen or registered apprentices (see, *Irvcon Roofing and Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594; *C. T. Windows Limited*, [1982] OLRB Rep. Nov. 1597 and [1983] OLRB Rep. May 627; *Mechanical Installations Roofing and Siding Ltd.*, [1985] OLRB Rep. Apr. 549; *Naylor Group Incorporated*, [1986] OLRB Rep. Nov. 1559 and [1986] OLRB Rep. Nov. 1563).

8. Accordingly, the Board does not find it appropriate to dispose of this application on the basis of the material presently before it. Instead, the Registrar is directed to schedule the matter for hearing for the purpose of hearing the evidence and representations of the parties with respect to the bargaining unit description, the appropriateness of the clarity note, and all other matters arising out of and incidental to the application.

9. In the circumstances, and having regard to the nature of the clarity note issued, the Registrar is directed to send a copy of this decision and a notice of hearing to the Mechanical Contractors Association of Ontario and the Ontario Pipe Trades Council of the United Association of Journeymen and apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

1969-87-U Roland Fillion, Complainant v. Joseph Brant Memorial Hospital, VS Services Ltd., and Canadian Union of Public Employees, Local 1065, Respondents

Adjournment - Practice and Procedure - Board adjourning to allow complainant an opportunity to file particulars - Counsel for the complainant filing particulars after deadline imposed by Board - Board striking from the complaint the matters to which the counsel's particulars relate

BEFORE: *R. A. Furness*, Vice-Chair, and Board Members *D. Patterson* and *J. A. Ronson*.

APPEARANCES: *C. J. Abbass* and *Roland Fillion* for the complainant; *Susan A. Lewis* for Joseph Brant Memorial Hospital; *James G. Knight*, *Ron Moumblow* and *Judith Martin* for VS Services Ltd.; *Brian Sheehan*, *Joanne Lloyd* and *Tim Shalhan* for the Canadian Union of Public Employees, Local 1065.

DECISION OF THE BOARD; June 14, 1988

1. The name of one of the respondents appearing in the style of cause is amended to read "Canadian Union of Public Employees, Local 1065".

2. The complainant has filed a complaint under section 89 of the *Labour Relations Act*. A panel of the Board (differently constituted, in part) entertained a request for an adjournment by the complainant on February 3, 1988. The Board ruled orally and subsequently reduced its decision to writing on February 4, 1988. In that decision the Board stated, in part, as follows:

3. The request for an adjournment based upon the desire to be represented by counsel is rejected by the Board. The complainant has had a reasonable opportunity to retain counsel and has not availed himself of this opportunity. The request for an adjournment was also based upon a belief and an assertion by the complainant that a proceeding before the Workers' Compensation Board may have a bearing on the issues in the instant complaint. The complainant has not satisfied the Board that the other proceeding will have a bearing on the instant complaint. Accordingly, the Board is not prepared to grant an adjournment of this hearing on this ground.

4. At the commencement of this hearing Local 1065 filed its reply and requested particulars of the complaint. This reply was not a *pro forma* reply as was the case in *Baycrest Centre of Geriatric Care*, [1976] OLRB Aug. 432. In these circumstances, while the complainant is required to provide particulars of its complaint, the Board is of the view that this request ought to have been made on an earlier date. The complainant is entitled to a reasonable opportunity to provide these particulars.

5. In these circumstances, the Board grants an adjournment of this hearing in order to give the complainant an opportunity to file its particulars. The Board directs the complainant to provide the particulars requested by Local 1065 to the parties and to file such particulars with the Board on or before February 18, 1988.

3. The complainant filed additional material which was received by the Board on February 17, 1988. In addition, counsel for the complainant filed particulars with the Board. Although counsel's letter was dated March 7, 1988, his letter was not received by the Board until April 5, 1988.

4. At the hearing on April 12, 1988, the Board entertained a number of motions with respect to this complaint under section 89 of the Act.

5. It was the position of Joseph Brant Memorial Hospital (the "Hospital") that this complaint ought to be dismissed as against the Hospital. It was the position of the Hospital that it did

not have an employer-employee relationship with the complainant and that it was not properly a party to the complaint. At the hearing before the Board, counsel for the complainant conceded that the Hospital was never the employer of the complainant. Counsel for the complainant also agreed that the complainant was employed by VS Services Ltd. ("VS"). In addition, counsel for VS stipulated that it had been the employer of the complainant at all material times. Counsel for the Canadian Union of Public Employees, Local 1065 ("Local 1065") also agreed that VS and not the Hospital was formerly the employer of the complainant.

6. Having regard to the material before it and to the representations of the parties, the Board finds that the complainant has not stated in its complaint a violation of any provision of the Act by the Hospital. In these circumstances, the Board dismissed this complaint in so far as it relates to the Hospital.

7. The Board entertained a motion with respect to the particulars filed by counsel for the complainant. It was the position of VS and Local 1065 that the Board ought not to permit counsel to file particulars which were not filed within the time provided for by the Board in its ruling of February 3, 1988. The ruling of the Board which directed the complainant to file particulars also directed that such particulars be filed with the Board on or before February 18, 1988. Both the complainant and his counsel were aware of the direction. The complainant complied with the direction. Counsel for the complainant did not offer any extenuating circumstances for not complying with the terms of the Board's direction of February 3, 1988. In these circumstances, and in accordance with the provisions of section 72 of the Board's Rules of Procedure, the Board strikes from the complaint the matters to which counsel's particulars allegedly relate.

8. The complainant in his complaint has alleged violations of sections 63, 66(c), 67, 68, 89, 91(18) and 95 of the Act. Section 63 is not an unfair practices section and the Board finds that none of the allegations raise any issue under section 63. This complaint is dismissed in so far as it relates to section 63. Section 89 is a procedural section which does not in itself confer rights and is the section under which this complaint has been filed. Section 91(18) refers to a situation which there is a conflict between two or more collective agreements with respect to the description of bargaining units and permits an application to be made by an employer or a trade union. The allegations do not give rise to any application of section 91(18) and the complainant, in any event, has no standing to invoke the provisions of section 91(18). This complaint is dismissed in so far as it relates to section 91(18). Section 95 refers to notice of a claim for damages after an unlawful strike or unlawful lockout where no collective agreement is in operation. Section 95 has no application on the alleged facts of this complaint and this complaint is dismissed in so far as it relates to section 95. The complainant has also raised in a peripheral manner the *Hospital Labour Disputes Act* and sections 137 to 151 of the *Labour Relations Act*. Nothing in the allegations in the complaint relate to the *Hospital Labour Disputes Act* or sections 137 to 151 of the *Labour Relations Act* and the complaint with respect to such Act and sections is accordingly dismissed.

9. VS requested the Board to dismiss this complaint in its entirety on the grounds that the complaint as particularized disclosed no *prima facie* case against it. The Board is not prepared to dismiss this complaint as requested by VS with respect to the complainant's allegations with respect to sections 66(c), 67 and 68 of the Act.

10. The Registrar is directed to list this matter for continuation of hearing.

2063-87-U Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Complainant v. M & K Plastic Products Limited, Respondent

Practice and Procedure - Remedies - Unfair Labour Practice - Board directing that grievor be reinstated and compensated - Complainant requesting that Board file its decision in court - Respondent not responding to allegation of non-compliance with Board order - Board filing its determination in court except for its remedial direction concerning compensation for lost wages - Board remaining seized with respect to compensation

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Rundle* and *D. A. Patterson*.

DECISION OF THE BOARD; June 13, 1988

I

1. This is a complaint under section 89 of the *Labour Relations Act* in which it was contended that "the grievor" Tony Bilikian had been discharged contrary to sections 64, 66, 70 and 79 of the Act. Mr. Bilikian's employment was terminated on October 23, 1987. In a decision dated February 29, 1988, the Board determined that Mr. Bilikian had indeed been unlawfully discharged and made the following remedial direction:

"We therefore direct that the grievor be reinstated, forthwith, and fully compensated for all wages and benefits lost. Such compensation shall, of course, be subject to the usual rules respecting mitigation and the provisions of Practice Note 13 respecting interest payable on unpaid wages."

The Board further directed that in order to counter the chilling effect which would necessarily flow from the discharge of a key union organizer during the course of a certification proceeding, the respondent must post a notice in the form more specifically set out in Appendix "A" to that decision in prominent places on its business premises where such notice would most likely come to the attention of bargaining unit employees.

2. By letter dated March 22, 1988 counsel for the complainant union and Mr. Bilikian wrote to the Board as follows:

We acknowledge receipt of the decision of the Board dated February 29, 1988 and released on March 2, 1988 in the above matter.

Pursuant to Section 106 of the Act we hereby request that the Board reconsider its decision in that the employer has been improperly named. In its decision the Board has listed "M & K Plastics Limited" as the Respondent. We hereby request that the decision of the Board be reconsidered and varied to indicate that the correct name of the Respondent is "M & K Plastic Products Limited".

Furthermore, in paragraph 40 of its decision the Board directed that the grievor be reinstated, forthwith, and fully compensated with all wages and benefits lost. We wish to advise the Board, as of the date of this letter, that the employer has failed or refused to comply with the Order of the Board. Accordingly, pursuant to Section 89(6) of the Act we hereby request that the Board file in the Office of the Registrar of the Supreme Court a copy of its decision, exclusive of the reasons therefore [sic].

We trust that the above is satisfactory and should you have any questions concerning any of the foregoing, please do not hesitate to contact us.

Counsel for the respondent was "copied" on that letter, and, in addition, after receipt thereof, the Registrar of the Labour Relations Board wrote to the respondent's counsel as follows:

March 25, 1988

Winkler, Filion & Wakely
Barristers and Solicitors
390 Bay Street
Toronto, Ontario
M5H 2G3

Attention: Mr. M. D. Failes

Dear Mr. Failes:

Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, v. M & K Plastics Limited

I am enclosing herewith a copy of a letter dated March 22, which has been received from the solicitors for the applicant in the above matter, with respect to which I would appreciate receiving your comments if any, in this office on or before April 12, 1988.

Very truly yours,

T. A. Inniss
Registrar
TAI/cr
Encl.

c.c. to:
M & K Plastics Limited
12 Melanie Drive
Brampton, Ontario
L6T 4K9
Attention: Mr. M. Fuchs

The respondent made no reply by its counsel or otherwise.

3. On May 18, 1988 counsel for the union and Mr. Biliikian renewed their request that the Board file its determination in court:

On March 22, 1988 we wrote to the Board requesting firstly that the Board reconsider and vary its decision to indicate that the correct name of the Respondent is "M & K Plastic Products Limited" and secondly to request that the Board, pursuant to Section 89(6) of the Act, file its decision in the Office of the Registrar of the Supreme Court of Ontario.

As of the date of this letter we have heard nothing further from the Board with respect to this matter. We note that Section 89(6) requires that the Board once notified of the failure to comply with the terms of a decision of the Board, and after notification in writing, is to "thereupon" file the determination, exclusive of the reasons therefore [sic], with the Registrar of the Supreme Court. It is now some two months since we wrote to the Board with respect to this matter and we would appreciate immediate action by the Board so that all efforts can be made to return the grievor to work.

The letter indicates that, as before, a copy was being delivered to counsel for the respondent. As of the date hereof there has been no response from the respondent to either letter, or the assertions

contained in them. The respondent has not contested the fact that it has neither reinstated nor compensated Mr. Bilikian in accordance with the Board's direction.

II

4. Section 89(6) of the *Labour Relations Act* provides:

Where the trade union, council of trade unions, employer, employers' organization, person or employee, has failed to comply with any of the terms of the determination, any trade union, council of trade unions, employer, employers' organization, person or employee, affected by the determination may, after the expiration of fourteen days from the date of the release of the determination or the date provided in the determination for compliance, whichever is later, notify the Board in writing of such failure, and thereupon the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons therefor, if any, in the prescribed form, whereupon the determination shall be entered in the same way as a judgment or order of that court and is enforceable as such.

5. Although [what is now] section 89(6) could be read as requiring the Board to file its determination with the Registrar of the Supreme Court upon merely being "notified" of non-compliance, for a number of years the Board considered it appropriate to require a party requesting that the Order be filed to prove the fact of non-compliance if such was disputed. This practice was consistent with the then current view that practical or labour relations difficulties arising from the Board determination should be addressed, initially, by the Board before seeking the intervention and involvement of the Courts. This procedure received the approval of the Court in *Chairtex Manufacturing* (1971) 3 O.R. 154 where the Court held that the Board did not exceed its jurisdiction by adopting this approach. More recently, however, the Board has introduced a procedure whereby it advises the respondent of the allegation of non-compliance, and gives the respondent an opportunity to take issue with that submission (see for example *Apple Bee Shirts Limited*, [1983] OLRB Rep. Dec. 1957). Where the respondent either agrees that there has been a failure to comply with the Board's determination or simply does not respond to the allegation of non-compliance, the Board will typically file its determination with the Court pursuant to section 89(6) of the Act, because, in the absence of any response, it will normally be satisfied that there has been a failure to comply. Neither *Chairtex* nor the terms of the statute *require a hearing*, and none is really necessary where the fact of non-compliance is not put in issue.

III

6. In the instant case the Board decision was dated February 29, 1988 and released to the parties over covering letter of the Registrar on March 2, 1988. On March 22nd the complainant advised the Board of the respondent's failure to comply. The respondent was given an opportunity to contest that fact but chose not to do so. A subsequent letter repeating the union's contention also received no response. In the circumstances the Board concludes that the fact of non-compliance is not disputed, and that this is an appropriate situation in which to file its determination with the Registrar of the Supreme Court of Ontario, so that the complainant may seek enforcement. There is however one difficulty which must be addressed.

7. In its decision the Board did not specifically quantify the amount of compensation payable to the grievor, Mr. Bilikian. The Board indicated at paragraph 40 that such compensation would be subject to the usual rules respecting mitigation and interest payable on unpaid wages; however in accordance with the Board's usual practice it left the matter to the parties to see if they could settle the amount of compensation without the necessity of a formal hearing. In the Board's experience, in the vast majority of cases, once liability has been established, the parties are able to work out between themselves the appropriate measure of compensation without further interven-

tion of the Board with its attendant costs and potential for further souring their collective-bargaining relationship. In this case, though, the Board has not yet quantified the employee's claim - a matter over which it has exclusive jurisdiction - and therefore we do not think that we can, at this stage, file that part of our remedial direction concerning compensation for lost wages. We will therefore cause to be filed all other aspects of our remedial direction and pursuant to sections 89 and 106 of the Act remain seized with respect to the question of compensation. Should the parties not be able to determine compensation (as appears to be the case, at least at this stage) we will schedule a further hearing before the Board to entertain the parties' evidence and representations with respect to that issue.

8. The final question addressed in counsel's letter is a change of name in the style of cause from "M & K Plastics Limited" to "M & K Plastic Products Limited". The latter form of name appears in the style of cause of the complaint, and the former appears in the respondent's reply. No issue was taken at the hearing about this discrepancy because it was perfectly clear to all concerned that the case involved the grievor's employer which was a manufacturer of plastic products with a plant at 12 Melanie Drive in Brampton, Ontario. In the circumstances the Board sees no reason why it should not accede to the complainant's request to amend the style of cause so that the name of the respondent reads "M & K Plastic Products Limited", and the same is hereby done *nunc pro tunc*.

2153-87-R National Capital Roadbuilders Association, Applicant v. Labourers International Union of North America, Local 527, Respondent v. Pipe Line Contractors Association of Canada, Intervener #1 v. Ottawa Construction Association, Intervener #2 v. The Utility Contractors' Association of Ontario Incorporated, Intervener #3 v. Labourers' International Union of North America, Ontario Provincial District Council, Intervener #4

Accreditation - Board finding all employers of construction labourers for whom the Labourers Union has bargaining rights in the roads, sewers and watermains, and heavy engineering sectors of the construction industry in Board Area 15 constitute a unit of employers appropriate for collective bargaining - Certificate forthcoming but not issued pending the Board's determination of whether it will continue to compile a Final Schedule "F" in applications for accreditation

APPEARANCES: *Walter Langley and William Scott for the applicant; S.B.D. Wahl and N. Scipioni for the respondent; Carl W. Peterson for intervener #1, Mastercraft Bridge & Engineering Construction (Ottawa) Ltd. and Spie Construction Inc.; Joe Liberman and Fred Connolly for intervener #3; Joe Liberman for intervener #2, Sarnia Construction Association and its members, Ontario Precast Concrete Manufacturers Association and its members, Canadian Dredge and Dock Company, Milne and Nichols Ltd., Pigott Construction Ltd., Greenspoon Brothers Ltd., Alnor Earthmoving Ltd., Moffat Construction Inc., Bot Construction, Todgen Construction, Con-Eng Contractors Inc. and O. J. Gaffney; David Strang for intervener #4; Daniel Fryzuk for Ambro Materials & Construction Ltd.; Werner O. Schmidt for Blier Inc.; Richard J. Nixon for Paul Daoust Construction Ltd.; Walter Pashnicki for Permanent Concrete; Robin B. Cumine for Steinberg Inc. and The Ontario Erectors Association.*

BEFORE: *N. B. Satterfield, Vice-Chair, and Board Members J. Trim and C. A. Ballantine.*

DECISION OF THE BOARD; June 28, 1988

1. This is an application for accreditation, construction industry, made pursuant to section 125 of the *Labour Relations Act*.

2. The applicant is party to a collective agreement with an uncertified council of trade unions representing the respondent Labourers International Union of North America, Local 527 (hereafter "Local 527") and two other trade unions. The collective agreement was effective from May 1, 1986, until April 30, 1988, and was in effect when this application was made on October 30, 1987. For ease of reference the Board will refer to it as "the Agreement". The Board is satisfied that more than one employer is bound to the Agreement and, therefore, is further satisfied that more than one employer is affected by this application. Accordingly, the Board finds that it has jurisdiction under section 125 of the Act to entertain this application.

3. The applicant is an incorporated association which, pursuant to its constitution, has an objective of representing employers in collective bargaining with trade unions. Therefore, the applicant is an employer's organization within the meaning of clause (d) of section 117 of the Act and, having regard to the material filed with the Board, is a properly constituted organization for the purposes of subsection 127(3) of the Act.

4. It is undisputed that the appropriate bargaining unit of employers should be described in terms of all employers of construction labourers for whom Local 527 has bargaining rights in the roads, sewers and watermains, and heavy engineering sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell. There is, however, a dispute with respect to many employers for whose employees Local 527 claimed bargaining rights. This dispute revolves around an issue of whether certain collective agreements on which Local 527 relies establish the bargaining rights asserted. A second issue is associated with it; that is, whether the Board is required to or should continue the practice of compiling a Final Schedule "F" when issuing an accreditation certificate and order. A Final Schedule "F" is a list of employers for whose employees the respondent trade union holds bargaining rights covering the relevant sector or sectors and geographic area, but who did not have such employees in the year prior to the making of the application. Those employers would be bound by the accreditation certificate and order, but would not be employers in the unit of employers for purposes of the findings required of the Board by subsections 127(1) and 127(2) of the Act. These issues are present with respect to one of the respondent trade unions in an earlier application for accreditation made by this applicant in Board File No. 2263-86-R. Therefore, they were listed for hearing together and notices of hearing were given to all interested parties and employers that the Board would be receiving evidence and representations respecting those issues in both applications.

5. The various parties at the hearing agreed on an order of procedure for dealing with those issues, and on certain conditions related thereto, which they requested the Board to follow. They agreed and requested that the Board first hear and determine the Schedule "F" issue and to defer receiving the evidence and representations on the bargaining rights issue until the Schedule "F" issue is decided. It was the parties' position that it would be unnecessary for the Board to decide the bargaining rights issue if the Board were to discontinue the practice of compiling a Final Schedule "F". If, however, the Board chose to hear and decide the bargaining rights issue at any subsequent hearing, it should serve notice of the hearing on the parties who had filed appearances at the hearing into this application on June 8, 1988. The parties were also agreed that the Board should determine whether the applicant was in a position to be accredited for a unit of employers as generally described above, on the understanding that none of the employers for whose employees Local 527 was claiming bargaining rights under the collective agreements that were in dispute

had employees in the relevant sectors and geographic area during the year immediately preceding the date of application. The parties were also agreed on other conditions which would apply should the Board decide it would no longer compile the Final Schedule "F". The Board accepted their agreement, and pursuant to it, heard the representations of the parties on the Final Schedule "F" issue. The Board reserved its decision on that issue.

6. The Board turned next to the question of whether the applicant was in a position to be accredited for the employers for whom it was seeking to be the exclusive bargaining agent. The Board made the requisite findings of fact and, subject to the Board's customary second check of the "count" information, advised the parties that the applicant was entitled to a certificate of accreditation. The Board's findings and conclusions given orally in the hearing are set out hereunder, except that the second check of the count information revealed that there were 23 employers in the unit found by the Board to be appropriate, instead of the 19 announced. This did not alter the ultimate conclusion that the applicant was entitled to a certificate of accreditation.

7. Having regard to the agreement of the parties, the Board finds that all employers of construction labourers for whom the Labourers International Union of North America, Local 527 has bargaining rights in the roads, sewers and watermains, and heavy engineering sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, constitute a unit of employers appropriate for collective bargaining.

8. Having further regard to the agreement of the parties, the Board declares that, for purposes of clarity, employers bound by specialty collective agreements which are also binding on Local 527 and are operative in or affecting the sewers and watermains, roads and heavy engineering sectors of the construction industry amongst other sectors being the following collective agreements binding between:

- (1) Labourers' Ontario Provincial District Council and various civil engineering contractors;
- (2) Labourers' Ontario Provincial District Council and the Utility Contractors Association of Ontario; and
- (3) Labourers' Ontario Provincial District Council and the Ontario Precast Manufacturers Association,

are not included in this bargaining unit in respect of such work.

9. Notice of this application was sent in accordance with the Board's Rules of Procedure to 267 employers, excluding duplications, for whose employees Local 527 claims to hold bargaining rights in the sectors and geographic area referred to in the unit of employers described above. 84 of those employers made returns in Form 94 - Employer Return in response to the Board's notice. Of the remaining 183 notices, 17 of them could not be delivered to the employers to whom they were addressed, five were replied to by letter and there was no response to 161 of them. The parties did not place before the Board any information or adduce any evidence that either confirms or disputes the information contained in the Form 94 returns and in the five letters. Nor did the parties place before the Board any information or adduce any evidence respecting the employers who failed to file a reply in any form or for those whose notices could not be delivered. Therefore, the Board makes its findings herein based on the representations in all of the pleadings filed and the representations, if any, made to the Board in the hearing with respect to those pleadings. 63 of the employers who filed returns in Form 94 or by letter denied that Local 527 held bargaining rights for their employees in the relevant sectors and geographic area and that they had employees in those

sectors and that area during the year immediately preceding October 30, 1987, the date of making of this application. 23 of the remaining 26 employers acknowledged that Local 527 does represent in collective bargaining their employees employed in those sectors and that geographic area and that they had employees in those sectors and that area during the year immediately preceding October 30, 1987. The Board finds as follows with respect to the three remaining employers:

Employer No. 110 - Donalco Services Ltd. states that it employed employees in the sectors and geographic area, but denies that Local 527 represents them in collective bargaining. Donalco Services Ltd. should not be placed on Final Schedule "E" set out below.

Employer No. 172 - Marley Canadian Inc. filed a list containing the names of two employees employed during the weekly payroll period immediately preceding October 30, 1987, but these employees were not employed in the sectors and geographic area described in the unit of employers. The employer did not answer the questions on the Form 94 with respect to whether Local 527 represented its employees in the sectors and geographic area and whether the employer had any employees in those sectors in that geographic area during the year immediately preceding October 30, 1987. This employer should not be placed on Final Schedule "E" set out below.

Employer No. 244 - Vulcan Asphalt and Supply Limited filed a list showing that it did not employ any employees during the weekly payroll period immediately preceding October 30, 1987, and failed to answer the questions on Form 94 with respect to whether Local 527 represented the employer's employees in the sectors and geographic area referred to in the unit of employers and whether the employer had employees in those sectors and that geographic area during the year immediately preceding October 30, 1987. This employer should not be listed on the Final Schedule "E" set out below.

Having regard to all of the foregoing, the Board has complied the list of employers on Final Schedule "E" set out below, that schedule being a list of employers who had employees in the roads, sewers and watermains, and heavy engineering sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell within one year prior to October 30, 1987, the date of making of this application.

Final Schedule "E"

Beaver Asphalt Paving Company Limited

Beaver Construction Group Limited, BeaverGV180,4;ES,3 Construction Ontario Division

Dibblee Construction Limited

Dufresne Piling Co. (1967) Ltd.

388685 Ontario Limited, c.o.b. as Central Paving Reg'd.

Choctaw Construction Co. Ltd.

Loretta Paving Company Limited

O'Leary's Limited

Taggart Construction Limited

Torus Construction Ltd.

Vallance & Levy Eng. Contractors Ltd.

Denis Brisbois Contractor Ltd.

Banchini Limited

Cardinal Refractories Inc.

Delta Tile & Terrazzo Co. Limited

Dumoulin and Associes Reparations de Beton Limitee
S. W. Farrell & Sons (1979) Limited
General Concrete Drilling Services
Construction P. H. Grager Inc.
W. D. Laflamme Limited
Gerard Lafleur Masonry Ltd.
R. Mannarino Construction Inc.
Vanis Masonry Construction Company Ltd.

10. On the evidence and pursuant to clause (a) of subsection 127(1) of the Act, the Board finds that the 23 employers on Final Schedule "E" are the employers in the unit of employers who, within one year prior to October 30, 1987, the date of making of this application, have had employees for whom Local 527 holds bargaining rights in the roads, sewers and watermains, and having engineering sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, the sectors and geographic area which the Board has determined to be appropriate.

11. The Board further finds on the basis of all the evidence before it that, on the date of making of this application, the applicant represented 15 of the 23 employers on Final Schedule "E" and 15 is the number of employers to be ascertained by the Board under clause (b) of subsection 127(1) of the Act. Therefore, the Board is satisfied that a majority of the employers in the bargaining unit is represented by the applicant.

12. The Board further finds on the basis of all the evidence before it, including in particular the Schedule "H" which accompanied the Form 94 - Employer Filing, filed by the individual employers, that there were 452 employees affected by this application during the payroll period immediately preceding October 30, 1987 and that 452 is the number of employees to be ascertained by the Board under clause (c) of subsection 127(1) of the Act. The Board further finds that the 15 employers in the bargaining unit represented by the applicant employed 405 of these 452 employees and, therefore, the Board is satisfied that the majority of the employers in the bargaining unit represented by the applicant employed a majority of the employees affected by this application as ascertained in accordance with the provisions of clause (c) of subsection 127(1) of the Act.

13. Therefore, the Board finds that all of the provisions of section 127 of the Act have been satisfied with respect to this application. However, no certificate will issue to the applicant pending the Board's determination of whether it will continue to compile a Final Schedule "F" in applications for accreditation.

0345-88-R Ontario Nurses' Association, Applicant v. Omni Health Care Ltd., Respondent

Bargaining Unit - Certification - Practice and Procedure - Reconsideration - Request to amend style of cause from corporate entity to internal operational unit - Request denied - Only corporate name to be included in style of cause - Restriction of bargaining rights indicated in bargaining unit description

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

DECISION OF THE BOARD; June 23, 1988

1. In a decision dated June 8, 1988 in respect of this application for certification, the Board wrote in part, as follows:

1. The name of the respondent is amended to read: "Omni Health Care Ltd."
2. This is an application for certification in which the parties have reached agreement on all matters in dispute and have further agreed to waive their right to a formal hearing in the matter.

• • •

4. Having regard to the agreement of the parties, the Board further finds that all registered and graduate nurses employed in a nursing capacity by the respondent at Riverview Manor in the City of Peterborough, save and except Director of Nursing and persons above the rank of Director of Nursing, constitute a unit of employees of the respondent appropriate for collective bargaining.

• • •

2. On June 10, 1988, the Registrar sent a copy of that decision to each of the parties. On June 16, 1988, the Board received the following letter:

RIVERVIEW MANOR NURSING HOME
1155 WATER STREET
PETERBOROUGH, ONTARIO K9H 3P8
(705) 748-6706

June 13, 1988

Ms. T.A. Inniss
Registrar
Ontario Labour Relations Board
400 University Avenue
Toronto, Ontario
M7A 1V4

Dear Ms. Inniss:

Re: File Number 0345-88-R

In response to your letter of June 10, 1988 it is necessary that the following wording be ammended [sic]:

The respondent should be identified as "Riverview Manor" not "Omni Health Care Ltd".

Omni Health Care Ltd. owns a number of facilities. Each facility is independant [sic] and functions as a seperate entity.

Thank you for your assistance in this matter.

Sincerely

"Audrey Richards"

Audrey Richards
Administrator

3. Having considered the respondent's request, the Board is of the view that it would not be appropriate to amend the style of cause in the manner requested by Ms. Richards. Although a corporation may use a number of divisions or other internal operational units, the use of such divisions or units does not change the fact that the legal entity which is the employer remains the corporation itself. To forestall various difficulties that might otherwise arise with respect to such matters as enforcement of Board decisions and orders, it is preferable to include only the corporate name of an (incorporated) employer in the style of cause of an application or complaint. If, as in the present case, it is appropriate to restrict the applicant's bargaining rights to employees who work in a particular division or operational unit that has been established by their corporate employer, this can be accomplished by referring to that division or operational unit in the description of the bargaining unit, as was done in paragraph four of the aforementioned decision, in which the unit was described as "all registered and graduate nurses employed in a nursing capacity by the respondent *at Riverview Manor in the City of Peterborough...*" (emphasis added). See, generally, *Beatrice Foods (Ontario Limited)*, [1982] OLRB Rep. June 815.

4. Accordingly, the request for variance of the Board's decision dated June 8, 1988 in this matter is hereby denied.

2845-87-R Ontario Secondary School Teachers' Federation, Applicant v. Ottawa Board of Education, Respondent

Bargaining Unit - Certification - School Boards and Teachers Collective Negotiations Act
- Whether occasional teachers employed in French language schools should be included in occasional teacher unit - Elementary unit including such teachers - Officer appointed to inquire into community of interest

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *W. N. Fraser* and *C. A. Ballantine*.

DECISION OF THE BOARD; June 9, 1988

1. By decision dated February 24, 1988, the Board directed the taking of a pre-hearing representation vote in this application for certification. The vote was held on March 7, 1988.

2. The parties disagreed about the inclusion in the bargaining unit of the occasional teachers employed by the respondent in its French language secondary schools established pursuant to

Part XI of the *Education Act* ("the Part XI teachers"). Accordingly, the Board directed that the voting constituency include those teachers but that should any of them attend to vote, his or her ballot was to be segregated.

3. The parties have agreed that we should determine this issue on the basis of their written submissions. (See the letter from counsel for the respondent dated March 15, 1988 and the letter from counsel for the applicant dated June 6, 1988.) There was no request for a hearing by any of the employees who were sent by mail "Notice of Report of Returning Officer Where Pre-Hearing Representation Vote has been held" (Form 71) which describes how representations may be made to the Board.

4. The elementary unit includes the Part XI teachers; the union argues, however, that in this case, there should not be a "mirroring" of units, since the number of Part XI teachers on the secondary panel is sufficient to constitute a separate unit of their own and because it has been the standard practice of the Board to exclude them.

5. The union relies on the announced intention of the Ontario government to establish a French school board in the Ottawa region. We are not aware that such intention has yet been realized. It also states that the Francophone Teachers Association (AEFO) has indicated that it is in the process of organizing the French occasional teachers, but we have no evidence of that and in any case, there is no application before this Board.

6. The Board of Education contends that the Part XI teachers should be included in the unit. It attempts to distinguish *Le Conseil Scolaire d'Ottawa*, [1985] OLRB Rep. July 1090, in which the Board certified L'Association des Enseignantes et Enseignants Suppléants for a bargaining unit comprised of Part XI teachers on the basis of the degree of community of interest between the English and French occasional teachers.

7. In *Le Conseil Scolaire d'Ottawa*, *supra*, the Board based its decision not only on the fact that under the *School Boards and Teachers Collective Negotiations Act, 1975*, R.S.O. 1980, c. 464 ("Bill 100"), the AEFO is given recognition as an affiliate teachers' organization representing francophone teachers wherever they are employed and that "[t]his in itself suggests that the francophone teachers may have a distinct community of interest", but also on the evidence adduced from which it was able to conclude that in that case, the Part XI teachers did in fact have a separate community of interest.

8. We note that while the respondent agreed to have the matter determined on the basis of written submissions, it also indicated that it was prepared to call evidence on these points. On the other hand, while the union has not specifically disputed the statements made by the Board of Education in its letter, at the meeting with the Labour Relations Officer held before the directing of the vote, it maintained that there is very little community of interest between the two groups. Therefore, given the dispute between the parties and the relevance of the issue of community of interest, upon reviewing the material filed at hearing by the parties in this application, we are of the view that we require evidence about the degree of community of interest between the two groups of teachers.

9. Regardless of the way in which this issue is resolved, however, the outcome of the vote is in the applicant's favour and therefore we may grant interim certification under subsection 6(2) of the *Labour Relations Act* ("the Act") if the requirements of the pre-hearing vote were satisfied.

10. No other statement of desire to make representations has been filed with the Board within the time fixed under subsection 70(2) of the Board's Rules of Procedure.

11. The Board finds that the applicant is a trade union within the meaning of clause 1(1)(p) of the Act.

12. For purposes of interim certification, the Board finds that

all occasional teachers employed by the respondent in its secondary panel in Ottawa, save and except those employees teaching in schools pursuant to Part XI of the *Education Act* and those persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*.

Clarity Note: Occasional Teacher has the meaning assigned to it by section 1(1)31 of the Education Act, and an employee who does not have the qualifications of a “teacher” as defined by s. 1(1)66 of that Act does not fall within that description.

constitute a unit of employees of the respondent appropriate for collective bargaining. (Should the Board conclude that Part XI teachers should be included in the unit, the final certificate issued would reflect that.)

13. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit, whether it includes Part XI teachers or not, were members of the applicant at the time the application was made.

14. On the taking of the pre-hearing representation vote directed by the Board, more than fifty per cent of the ballots cast were cast in favour of the applicant. This outcome would not be affected even if all the segregated ballots had been cast against the union.

15. Therefore, we grant the applicant interim certification in this matter.

16. We also direct the appointment of a Labour Relations Officer to conduct an inquiry into the question of the community of interest between the English and French teachers based on the principles articulated in *Usarco Limited*, [1967] OLRB Rep. Sept. 526.

17. This matter is referred to the Registrar.

0068-88-R Canadian Guards Association, Applicant v. Pinkerton's of Canada Ltd., Respondent

Certification - Charter of Rights and Freedoms - Trade Union - Whether applicant has status to acquire certification of security guards by reason of its affiliation with another union that admits to membership persons other than guards - CGA affiliated with USWA by virtue of a service contract - CGA found to be affiliated with USWA within the meaning of s.12 - Listed for further hearing on issue of whether s.12 contravenes freedom of association in Charter

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *W. H. Wightman* and *H. Peacock*.

APPEARANCES: *P. Turtle* and *Stuart Deans* for the applicant; *John A. Coleman*, *George Donovan* and *Jacques Charpentier* for the respondent.

DECISION OF THE BOARD; June 27, 1988

1. This an application for certification. In Appendix A to its (Form 10) Reply, the respondent submitted that the application should be dismissed on the following grounds:

- a) Respondent's labour relations fall within the exclusive constitutional jurisdiction of the federal government and consequently are not subject to this Board's jurisdiction;
- b) Pursuant to section 12 of the Act, Applicant has no status to seek or acquire certification of Respondent's security guards by reason of Applicant's avowed affiliation with an organization that admits to membership persons other than security guards;
- c) Applicant's membership evidence is tainted "*in toto*" by reason of the active and illicit participation of a representative of management in Applicant's organizing campaign.

2. Prior to the June 1, 1988 hearing of this matter, the parties' representatives met with a Board Officer and, without prejudice to the respondent's position regarding the foregoing grounds, reached agreement on certain matters, including an agreement that notwithstanding the constitutional jurisdictional issue, the parties would request the Board to hear argument regarding section 12 first, before considering any other issues.

3. By letter dated May 26, 1988, counsel for the applicant advised the Board, the Attorney General for Ontario, the Attorney General for Canada, and respondent's counsel as follows in respect of this matter:

I am counsel to the Canadian Guards Association in the above captioned matter. An Application for Certification with respect to certain employees of the respondent was filed on April 11, 1988. I have conferred with counsel for the respondent in this matter and we have agreed that upon the commencement of the certification hearings in Ottawa on June 1, 1988 before the Ontario Labour Relations Board the first issue to be addressed will be the preliminary objection raised by the respondent that the Board should refuse to certify the applicant trade union pursuant to s.12 of the Labour Relations Act.

In reply to the respondent's position the trade union confirms that it will be taking the position that s.12 of the Act does not apply to bar certification because the trade union referred to above is not "affiliated, directly or indirectly, with an organization that admits to membership persons other than guards". Alternatively the union will be arguing that a portion of s.12 should be struck down as it violates the guarantee of freedom of association contained in s.2 (d) of the Canadian Charter of Rights and Freedoms. The trade union takes the position that the portion of s.12 which states "... no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employer's organization shall be required to bargain

with a trade union on behalf of any person who is a guard, if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly with an organization that admits to membership persons other than guards" constitutes a violation of the Charter. The union is not challenging that portion of s.12 which prohibits the inclusion in a bargaining unit with other employees a person employed as a guard to protect the property of an employer as constituting a violation of the Charter of Rights and Freedoms.

4. At the June 1, 1988 hearing of this matter, counsel advised the Board that they had further agreed to request the Board to hear and determine the issue of whether or not the applicant (also referred to in this decision as the "CGA") is "affiliated, directly or indirectly, with an organization which admits to membership persons other than guards" (the "section 12 issue") on the understanding that if the Board decided that it was, evidence and argument would be presented at a later date concerning the Charter issue. Since it appeared to the Board that the procedure suggested by the parties might expedite the hearing of the matter by avoiding unnecessary evidence and argument, the Board acceded to that request. Consequently, this decision deals only with the section 12 issue.

5. It is common ground between the parties that "the guards covered by the application protect the property of employers within the meaning of section 12 of the Act, and in accordance with the Board's caselaw dealing with conflict of interest, such that their duties include the surveillance and monitoring of both property and employees of employers". It is also common ground between the parties that the applicant has entered into the following contract (the "Service Contract") with the United Steelworkers of America (the "USWA"):

SERVICE CONTRACT

between

UNITED STEELWORKERS OF AMERICA

(hereinafter "USWA")

and

CANADIAN GUARDS ASSOCIATION

(hereinafter "CGA")

WHEREAS the USWA and the CGA desire to enter into this Service Agreement so as to improve the quality of the working lives of all members of the CGA; and

WHEREAS the USWA and the CGA desire to develop a relationship which will result in the integration of the CGA into the USWA in a manner which preserves the identity of the CGA as part of the USWA;

NOW THEREFORE the USWA and the CGA, in consideration of their mutual promises, agree as follows:

1. This Service Contract shall be effective from October 1, 1987, to September 30, 1991.
2. The USWA shall provide all support and technical services to the CGA and to its members which the USWA provides to its own chartered local unions and to its own members.
3. In addition to the services outlined in paragraph 2, above, the USWA shall make available to the CGA the USWA offices in Ontario.

4. Commencing January 1, 1988 the CGA shall pay to the USWA at the end of each calendar month a Service Fee to be the total of the following:

Per member of the CGA or any of its locals who have worked for more than five days during the calendar month, the fee shall equal a total of one hour's pay based upon each member's total earnings during the calendar month provided the payment for each member by the CGA to the USWA shall not be less than Five Dollars (\$5.00) per member per calendar month.

5. USWA employees and agents shall not execute any documents, including any collective agreements, on behalf of the CGA.
6. The CGA shall hold the USWA harmless with respect to any act or omission performed by any employee or agent of the USWA in the course of such person providing services to the CGA in accordance with the terms of this Agreement, if performed in good faith.
7. At least one employee or agent of the USWA shall be invited to attend every meeting of all locals of the CGA and shall be entitled to participate in such meetings but shall not be entitled to vote on any matter.
8. The CGA shall co-operate and support the USWA in complying with all sections of the Ontario Labour Relations Act (hereinafter "the Act") in the event that the USWA decides to seek to become the legal bargaining agent with respect to any or all locals of the CGA. It is expressly acknowledged that this may occur by way of applications under the successor union provisions of the applicable statute or by way of displacement application for certification filed with the Ontario Labour Relations Board or the Canada Labour Relations Board, as the case may be. It is also expressly understood and agreed that no such application shall be filed prior to October 1, 1988 so as to afford the CGA a reasonable opportunity to evaluate the services provided by the USWA in accordance with this Agreement.
9. In the event that any employer objects to any USWA displacement application for certification or any USWA application under section 63 of the Act filed with the Ontario Labour Relations Board as aforesaid in paragraph 7 above, the CGA expressly agrees that it will join with the USWA in any and all legal proceeding to challenge any such employer objection on any grounds including the constitutional validity of section 12 of the Act. The USWA expressly agrees that it shall be responsible for all fees with respect to legal representation in any such proceeding and the CGA expressly agrees that both the CGA and the USWA shall be represented by legal counsel selected by USWA. CGA may appoint its own legal counsel at its own cost. USWA shall reasonably consider any request by CGA to name the legal counsel acting on the application.
10. Before February 1, 1988 the CGA shall provide the USWA with a complete list of all the bargaining units of the CGA including the names and addresses of all employers with whom the CGA have [sic] collective agreements, the number of employees in each CGA bargaining unit, as well as with copies of each CGA collective agreement and, where possible, a list of the names, addresses and telephone numbers of all members of the CGA. This material shall be updated on January 15, April 15, July 15 and October 15 of each year and forwarded to the USWA by not later than thirty days following each date as aforesaid.
11. The USWA and the CGA both recognize that during the life of this agreement the CGA and for [sic] its locals may lose their/its legal existence and that it/they may become part of the USWA but that the integration of the CGA and/or any of its current locals into the USWA will be accomplished by maintaining the CGA's independent identity even after the integration.
12. In the event that the CGA and the USWA cannot be integrated as aforesaid because of the determination by the Ontario Labour Relations Board or by any Court, the

USWA and CGA expressly agree that this service agreement will be subject to renewal negotiations commencing on June 15, 1991.

13. Subject to paragraph 14, below, this Agreement may be terminated for any reason whatsoever upon written notice of not less than three calendar months by one party to the other during which time the USWA and the CGA shall continue to comply with this agreement.
14. The USWA may terminate this Agreement upon one week's notice to the CGA, or four weeks notice if a paragraph 9 application is being processed, if the USWA determines that the CGA has failed to comply with the provisions of paragraph 4, above. Said notice shall be by registered mail and time commences to run the 3rd day after mailing. Termination shall be cancelled by payment within the time period. The time period may only end on a regular business day and extensions shall automatically take effect.

DATED at Toronto, this 12 day of February, 1988.

6. Other documents entered as exhibits in these proceedings on the agreement of the parties (subject to argument concerning their relevance, if any, to the section 12 issue) include the USWA Constitution, the Constitution of the Canadian Labour Congress (the "CLC"), the CGA Constitution and By-Laws (and some amendments thereto), and certain CGA motions concerning the Service Contract. That documentation indicates that the CGA's Constitution has been amended to permit the applicant to merge with the USWA on the approval of a two-thirds majority vote of the National Executive Board and Council present and voting at an annual, general, or special meeting. (That constitutional amendment also provides for any objection to a merger vote to be brought forth at a special meeting of the CGA to be called by the National Executive Board after a request for such meeting is filed by a majority of locals.) The documentation also indicates that the CGA's per capita union dues are one and one-half hours' pay per month.

7. The following letter, which was sent on CGA letterhead on or about March 21, 1988, was also entered as an exhibit on the agreement of the parties:

TO ALL PINKERTON GUARDS IN OTTAWA

WELCOME

You are all aware of the grave necessity for the improvement in wages, benefits and many other working conditions to improve the integrity of the Security Guard industry in Ottawa.

The Canadian Guards Association was established in 1957 and its members currently earn an average of \$11.00 per hour.

In 1982, an Association similar to ours in Quebec, composed of only 6 guards, entered into a service contract and eventually merged with the United Steelworkers of America. They now represent more than 13,000 security guards and have increased salaries and benefits by over 50%, thus greatly improving the working conditions they live under.

On February 12, 1988, the Canadian Guards Association in Ontario entered into a similar contract with the United Steelworkers of America in an attempt to benefit from their vast organizing experience, their research, legal and service staff resources, and to bring here in Ottawa, the significant benefits and success enjoyed by those security guards unionized in the Province of Quebec.

You have a legal right to join the Guards Association under Ontario law, free of company interference. As you are aware the company terminated Mr. Doug Foley's employment for his union activities. Charges are being filed with the Ontario Labour Relations Board and our legal staff are confident that the company will be forced to return Mr. Foley to his job.

The signing campaign is going very well and with your support, we will be able to apply for certification in the near future. If an organizer has not already called on you, and you wish to sign a card or get more information, please call 737-1195.

Fraternally yours

"Stuart Deans"

Stuart Deans
National Executive
Officer
Canadian Guards
Association

It is an agreed fact that the telephone at the number set forth in that letter is answered "United Steelworkers of America".

8. Respondent's counsel submitted that the CGA is affiliated with the USWA by virtue of the Service Contract. In support of that position he referred to various provisions of the contract and to the CGA motions which laid the ground-work for it. He also referred the Board to the definition of "affiliate" contained in *The Random House Dictionary of the English Usage*, which reads in part as follows:

1. to bring into close association or connection...
2. to attach or unite on terms of fellowship; associate....

He also quoted the following definition of "affiliation" contained in *Black's Law Dictionary* (5th Ed., 1979):

Act or condition of being affiliated, allied, or associated with another person, body, or organization. Imports less than membership in an organization, but more than sympathy, and a working alliance to bring to fruition the proscribed [sic] program of a proscribed [sic] organization, as distinguished from mere co-operation with a proscribed [sic] organization in lawful activities, is essential....

The respondent also contends that in view of the provisions of the Service Contract, guards could well find themselves in a conflict of interest situation when called upon to provide surveillance and monitoring of employees represented by the USWA, if the CGA were certified as the guards' bargaining agent.

9. Counsel for the applicant submitted that the CGA is neither directly nor indirectly affiliated with the USWA. She contended that the Service Contract is merely a contract which provides for services to be rendered by the USWA as an agent for the CGA, in exchange for money. She acknowledged that the Service Contract contemplates that the CGA may be integrated into the USWA, but submitted that such integration has not yet occurred and that its future possibility cannot be taken into account in this case. It was also her contention that there can only be an affiliation where entities are bound together or controlled by constitutional obligations such as those which exist between the CLC and its affiliated organizations under the CLC Constitution, or between a parent union and its locals under a union constitution. She further submitted that the relationship between the CGA and USWA under the Service Contract does not give rise to a conflict of interest of the type which section 12 is designed to prevent. During the course of her submissions she referred the Board to *Canadian Paperworkers Union, Local 4 v. Fraser Inc.*, 85 CLLC ¶16,064 (N.B.I.R.B.). She also cited *Ontario Hydro Employees Union and Ontario Hydro-Electric*, 57 CLLC ¶18,080, and *Navco Food Services Limited*, [1971] OLRB Rep. Feb. 80,

which she acknowledged to be Board decisions that, in the context of successorship proceedings (under what is now section 62 of the Act), adopt a position at variance with that advocated by the CGA in the instant case, by construing affiliation as covering situations where no control is exerted by one union over another. However, she urged the Board to adopt a more restrictive approach in the context of section 12.

10. Section 12 provides as follows:

The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.

The purpose of that section is to protect against conflicts of interest between guards' duties to the employer whose property they are obliged to protect, and their expected loyalty to the employer's employees: see, generally, *Kimberly Clark of Canada Ltd.*, [1987] OLRB Rep. Oct. 1255; *Citicom Inc.*, [1985] OLRB Rep. Jan. 57; *Wells Fargo Armcar, Inc.*, [1981] OLRB Rep. July 1046; and *Canadian Paperworkers Union, Local 4 v. Fraser Inc.*, *supra*.

11. It is unnecessary in the instant case to attempt to exhaustively define the term "affiliated". It is sufficient for the purposes of this decision to indicate that, in our view, the portion of section 12 which is in issue in these proceedings covers contractual arrangements of the type contained in the Service Contract, and is not confined to situations in which unions are bound together or controlled by constitutional obligations. Thus, having duly considered the submissions of counsel and all of the material which has been placed before us, we have concluded that the applicant is "affiliated, directly or indirectly, with an organization which admits to membership persons other than guards", namely, the USWA. Under the terms of the Service Contract, the USWA is obliged to provide all support and technical services to the CGA and to the CGA's members which the USWA provides to its own chartered local unions and to its own members. It is also required to make available to the CGA the USWA offices in Ontario. As a result of the latter provision, guards in the employ of the respondent were invited (by the letter quoted above), as part of the applicant's organizing campaign, to call a number which is answered "United Steelworkers of America". At least two-thirds of the dues paid by members of the CGA flow through to the USWA under the terms of the Service Contract, which also requires the CGA to provide the USWA with a complete list of all CGA bargaining units and, where possible, with a list of the names, addresses, and telephone numbers of all members of the CGA. It also obligates the CGA to co-operate and support the USWA in complying with all sections of the Act in the event that the USWA decides to seek to become the legal bargaining agent with respect to any or all locals of the CGA. The contract further stipulates that at least one employee or agent of the USWA shall be invited to attend every meeting of all locals of the CGA and that the employee or agent shall be entitled to participate in such meetings. Thus, in view of the very close relationship which exists between the CGA and the USWA under the terms of the Service Contract, we have concluded that the CGA is "affiliated, directly or indirectly," with the USWA within the meaning of section 12 of the Act.

12. For the foregoing reasons, the Board has concluded that unless the applicant's Charter argument is successful, section 12 will preclude the Board from certifying the applicant and requiring the respondent to bargain with the applicant on behalf of any of the respondent's guards, because the applicant is affiliated with an organization that admits to membership persons other than guards.

13. This matter is referred to the Registrar to be listed for continuation of hearing.

3337-87-R; 3338-87-R; 0052-88-U; United Brotherhood of Carpenters & Joiners of America, Local 27, Applicant/Complainant; v. Povoa Carpentry Trim o/b 563808 Ontario Inc. and Labourers' International Union of North America, Local 183; F. J. Carpentry, Respondents v. Labourers' International Union of North America, Local 183, Intervener

Evidence - Practice and Procedure - Counsel for applicant seeking to have his witness declared hostile under the Evidence Act - Counsel given leave to cross-examine his witness

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

APPEARANCES: *David McKee* and *Luis Camara* for applicant/complainant; *M. Failes* and *Jose Lopez* for the respondent Povoa Carpentry Trim; no one appearing for the respondent F. J. Carpentry; *Michael Mitchell*, *Tanya Lee* and *Quinto Ceolin* for the intervener.

DECISION OF THE BOARD; June 8, 1988

1. Board File Nos. 3337-87-R and 3338-87-R are applications for certification by the United Brotherhood of Carpenters and Joiners of America, Local Union 27 ("Local 27"). Local 27 is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 10, 1980, the designated employee bargaining agency is the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

2. Board File Nos. 3337-87-R and 3338-87-R are applications for certification within the meaning of section 119 of the *Labour Relations Act* and are applications made pursuant to section 144(1) which provides:

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

3. In Board File No. 3337-87-R, Local 27 seeks to be certified as the exclusive bargaining agent for a unit of employees of Povoa Carpentry Trim, o/b 563808 Ontario Inc. ("Povoa") which it describes, in paragraph 7 of its application, as:

- (a) All Carpenters and Carpenters' Apprentices employed by the Employer in the Industrial, Commercial and Institutional Section of the Construction Industry in the Province of Ontario; *and*
- (b) All Carpenters and Carpenters' Apprentices employed by the Employer in Board Area 8 excluding the Industrial, Commercial and Institutional Sector, save and except non-working Foreman and persons above the rank of the non-working Foreman.

In the same file, the Labourers' International Union of North America, Local 183 ("Local 183") has applied, by intervention, to be certified as the exclusive bargaining agent for a unit of employees of Povoa which it describes, in paragraph 3 of its intervention, as:

All carpenters and carpenters' apprentices in the employ of the Respondent in Ontario Labour Relations Board Area 8 in all sectors of the construction industry, save and except the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

Local 183 is a trade union within the meaning of section 1(1)(p) of *Labour Relations Act*. Its application for certification is one within the meaning of section 119 of the Act but does not relate to the industrial, commercial and institutional sector of the construction industry referred to section 117(e) of the Act.

4. In Board File No. 3338-87-R, Local 27 is applying to be certified as the exclusive bargaining agent of employees of F. J. Carpentry ("F. J."), in a unit described, in paragraph 7 of the application, as:

- (a) All Carpenters and Carpenters' Apprentices employed by the Employer in the Industrial, Commercial and Institutional Section of the Construction Industry in the Province of Ontario; *and*
- (b) All Carpenters and Carpenters' Apprentices employed by the Employer in Board Area 8 excluding the Industrial, Commercial and Institutional Sector, save and except non-working Foreman and persons above the rank of non-working Foreman.

Local 183 has also applied, by intervention, for certification in that application. It seeks certification for a unit of employees it describes, at paragraph 3 of its intervention, as:

All carpenters and carpenters; apprentices in the employ of the Respondent in Ontario Labour Relations Board Area 8 in all sectors of the construction industry, save and except the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen.

Further, at paragraph 7(3) of its intervention Local 183 states:

The Intervener takes the position that the Respondent herein is actually the business name for two or three piece work carpenters who are employees of Povoa Carpentry Trim o/b 563808 Ontario Inc., which is the Respondent in Board File 3337-87-R

The Intervener herein makes this application in the alternative and only in the event the Respondent herein is found by the Board to be an employer in its own right.

5. Board File No. 0052-88-U is a complaint under section 89 of the *Labour Relations Act*, by Local 27, alleging that Povoa and Local 183 have dealt with Local 27 in a manner contrary to sections 3, 13, 64, 66, and 70 of the *Labour Relations Act*. Although it is not clear, on the face of the complaint, what relief Local 27 seeks, it is evident that the complaint is related to the application in Board File No. 3337-87-R.

6. All three matters came on for hearing together on May 6, 1988. At the hearing, the Board ordered that they be consolidated.

7. Local 27 proceeded to call its evidence first. Its second witness was Alberto Macaes Morim. In the course of the examination-in-chief of that witness, counsel for Local 27 sought to invoke section 23 of the *Evidence Act* R.S.O. 1980 c. 145, a declaration that he is a hostile witness, and leave to cross-examine him.

8. At common law, a party is not permitted to introduce general evidence to impeach the character of its own witness. It can, however, contradict him/her with respect to particular facts, even though doing so could consequently impeach the general character of the witness (see *Bradley v. Ricardo* (1831) 131 E.R. 321; *Harper v. Griffiths* 65 O.L.R. 688 (Ont. C.A.); *Sitkoff v. Toronto Ry* (1916), 36 O.L.R. 97 (Ont. C.A.)). The uncertainty that resulted from this situation led to the enactment of statutory provisions like section 23 of the *Evidence Act* which provides that:

23. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or, if the witness in the opinion of the judge or other person presiding proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his present testimony, but before such last-mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and he shall be asked whether or not he did make such statement.

For purposes of this proceeding, we assume, without finding, that section 23 of the *Evidence Act* applies. When a party seeks, as Local 27 does in this proceeding, to invoke that provision, the judge or other person presiding is obliged to determine whether or not the witness has been proven "adverse". If such a finding is made, circumstances sufficient to designate the occasion(s) when the witness allegedly made, at some previous time, a statement inconsistent with his/her present testimony must be put to the witness and s/he must be asked whether s/he made such a statement. If the witness admits having made such a statement s/he may be asked if it was true. If the witness denies making such a statement, the person presiding may allow the allegedly prior inconsistent statement to be proved, and, if proved, admitted into evidence. If the witness admits the truth of a prior inconsistent statement, it is admissible as evidence of the truth of its contents. If s/he does not admit its truth, the only effect that it can have, by itself, is to impeach the witness's previous testimony at the hearing (*Wawanesa Mutual Insurance Co. v. Hanes* [1961] O.R. 495 (Ont. C.A.); *Boland v. The Globe & Mail Ltd.* [1961] O.R. 712 (Ont. C.A.) and see also *R v. Duckworth* (1916), 37 O.R. 197 (Ont. C.A.)).

9. Section 23 of the *Evidence Act* covers the field with respect to prior inconsistent statements made by a witness of a party producing him/her. The policy underlying it was explained by McKay J. A. in *Wawanesa, supra*, at pages 529 and 534 as follows:

... there is support in many of the decisions I have referred to for the proposition that it is in the interests of justice that where a witness has previously made a statement in regard to the matters in issue at a trial that is inconsistent with his testimony in the witness-box, that that fact should be made known to the trial tribunal in order that proper weight may be given to the evidence.

... The only purpose of a trial, in so far as the facts of a case are concerned, is to ascertain the truth of the matters in issue and it seems to me that this purpose might well be defeated if a party were not permitted to show that a witness called by him in good faith, on reliance of the witness's previous statement, had told a story in the witness-box inconsistent with his previous statement in respect of the same facts. In such case it is of utmost importance, in the interests of justice that such a witness should be compelled to explain his change of story.

10. In addition, it is evident that a finding that a witness is adverse within the meaning of

section 23 of the *Evidence Act* does not mean that s/he is "hostile" within the meaning of the common law. Hostility is a higher form of adversity. To put it another way, all hostile witnesses are adverse but not all adverse witnesses are hostile. The significance of the difference is illustrated by the effect of a finding that a witness merely is adverse compared to that of a finding that a witness is hostile. As MacKay J. A. stated at pages 528 and 532 of *Wawanesa, supra*:

It is to be observed that the only right given by s. [23] [of the *Evidence Act*] is, if the witness proves adverse, with leave of the Judge, to prove that the witness made at other times a statement inconsistent with his present testimony. There is nothing in the section as to cross-examination and the section does not come into operation unless there is evidence to prove a prior inconsistent statement. There is, I think, no question that if a witness proves hostile and is so declared by the Judge, counsel may cross-examine the witness generally as to the matters in issue in the manner stated by Cross, including cross-examination as to any prior inconsistent statements, whereas on an application made under s. [23] of the *Evidence Act*, the only right that can be given is to prove the prior inconsistent statement after having drawn to the attention of the witness, the statement and the circumstances of the making of it and asking him whether he had in fact made it. If he admits having made it that admission supplied the proof and the calling of witnesses to prove the making of it would be unnecessary but unquestionably he could be questioned in regard to whether the prior statement was true and if he admitted its truth it would be evidence to be considered in the case. If he denied its truth but admits having made it, or if he does not admit having made it and it is proved by other witnesses that he did, then it goes only to the credibility of the witness.

• • •

This decision points up the difficulty or result of treating the word "adversity" in the statute as meaning "hostile" because unquestionably if the witness is "hostile" the common law rule applies and he is subject to a general cross-examination as to all matters in issue; whereas, under the statute, if he is adverse, the only right given is to prove the prior inconsistent statement and cross-examination should be limited to the prior inconsistent statement only.

The law in Ontario is that a prior inconsistent statement by a witness may be considered as evidence of adversity or of hostility. In determining whether a witness is hostile, a court or tribunal is not limited to a consideration of the witness's demeanour and manner. Unless Local 27 can satisfy the Board that Morim is hostile, in the sense that he is not giving his evidence fairly and with the desire to tell the truth because of an antagonistic attitude toward the applicant, it cannot be permitted to cross-examine him fully (see *Wawanesa, supra* and see also *Reference Re R. V. Coffin* [1956] S.C.R. 191 (S.C.C.)).

11. Morim was less than forthcoming in response to the questions asked of him in examination in chief. Counsel for Local 27 asked Morim whether he had had any discussion with Jose Lopez, the owner of Povoa, about a union or unions. Morim said "I didn't speak to anybody, nothing". Counsel then asked Morim whether he had heard Lopez discussing "going or not going union with anyone". Morim answered "no". Counsel then put to Morim the circumstances of a meeting earlier that morning, prior to the hearing with counsel and Local 27's Luis Camara, and suggested to Morim that he had said, at that meeting, that "Lopez had told you it would be more expensive for him if you joined Local 27 and he would have to reduce what he paid you if you joined Local 27 and that it would be better for you to join Local 183". Eventually and reluctantly, Morim admitted making that statement or one to that effect.

12. The Board is satisfied that Morim's statement to the applicant at the morning meeting prior to the hearing is inconsistent with his statement under oath that he had had no discussion with Lopez about unions. Accordingly, the fact that that statement was made is admissible as evidence in this proceeding. The Board is also satisfied that Morim is a witness adverse to Local 27, the party calling him.

13. The Board is also satisfied that, having regard to the prior inconsistent statement by Morim, the seriousness and obvious relevance of the contents thereof (see *The Corporation of the Town of Meaford*, [1981] OLRB Rep. June 634 at para. 10), and Morim's manner and demeanour on the witness stand, Morim is a witness hostile to Local 27 and we so declare. Accordingly, and having regard to the purpose of this proceeding, the Board, in its discretion, grants leave to Local 27 to cross-examine Morim on all matters relevant to the issues before the Board.

14. The hearing will continue on the dates scheduled by the Board at the hearing (June 20, August 2, October 26, 27, 1988).

3528-87-R United Steelworkers of America, Applicant v. Screen Print Display Advertising Limited, Respondent

Bargaining Unit - Certification - Board determining appropriate bargaining unit in displacement application - Board not adopting language used in incumbent's collective agreement - Use of standard Board terminology would not give the applicant any bargaining rights which the incumbent did not have - Certificate issuing

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

DECISION OF THE BOARD; June 28, 1988

1. The applicant seeks certification as exclusive bargaining agent for employees of the respondent presently represented by The Employees' Association of Screen Print Display Advertising Limited ("the incumbent"). In an earlier decision (now reported at [1988] OLRB Rep. April 425), we directed that a pre-hearing representation vote be conducted. That vote was conducted on April 28, 1988. The majority of the ballots cast were cast in favour of the applicant. The only outstanding issue concerns the precise description of the bargaining unit for which the applicant is to be certified.

2. The last collective agreement between the respondent and the incumbent contains the following recognition provision:

ARTICLE 2 - RECOGNITION

The Company recognizes that the Association is the sole collective bargaining agent for all of its employees described in the wage schedule of this Agreement at its plants in the City of Brantford, save and except foremen/women, persons above the rank of foremen/women, office, creative and sales staff, security guards, part time employees, which are defined as employees whose term of employment is not expected to exceed three months and students employed during the school vacation period.

The respondent says that the appropriate bargaining unit for the purpose of this application should be described as follows:

All employees of the respondent described in the wage schedule of the agreement in the City of Brantford save and except forepersons, persons above the rank of foreperson, office, creative

and sales staff, security guards, persons regularly employed for not more than 24 hours a week and students employed during the school vacation period.

[emphasis added]

In accordance with the usual practice, a Labour Relations Officer met with representatives of the applicant, the respondent and the incumbent ("the participants") after the application was filed and before the Board made its order directing conduct of a pre-hearing representation vote. One of the purposes of that meeting was to confer with the participants as to the description and composition of an appropriate bargaining unit. In her report on that meeting, the Labour Relations Officer noted the participants' agreement that at all times relevant to this application, the wage schedule of the collective agreement covered all employees of the respondent except those expressly excluded by Article 2. In those circumstances, the report also noted that the applicant did not object to inclusion of the words "described in the wage schedule of the agreement" in the bargaining unit description, but it was indicated that this would be a matter for the Board to determine. Apart from that, the applicant agreed with the respondent's description.

3. Apart from the question whether it would be appropriate to include the words "in the wage schedule of the agreement" in the description of the bargaining unit, our earlier decision raised the following concerns about the differences between Article 2 of the collective agreement and the proposed bargaining unit language with respect to part-time employees:

If the applicant were to be certified in this application for a unit described as the parties propose, it appears the incumbent would continue to have bargaining rights for a unit (however empty and however likely to remain so) of employees regularly employed for not more than 24 hours a week, save and except employees whose term of employment is not expected to exceed three months and others presently excluded from the incumbent's unit. It is not our function to determine the appropriate bargaining unit at this stage. That is dealt with, if at all, after the vote is conducted. Against the possibility that the panel which deals with that issue may then be concerned with the differences in scope between the incumbent's unit and the proposed unit, the parties should address this point in the submissions they file after the vote is conducted.

In the submissions he filed after the vote was conducted, counsel for the respondent noted that the incumbent had originally been certified to represent the following bargaining unit:

All employees of Screen Print Display Advertising Limited at Brantford, save and except foremen, persons above the rank of foreman, office, creative and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

Counsel acknowledged that a reading of Article 2 of the collective agreement could lead to the interpretation that the incumbent held bargaining rights for certain persons employed for not more than twenty-four hours per week, but asserted that the incumbent Association had never in fact asserted bargaining rights with respect to any such employees. He suggested that correspondence with the Association might put this point to rest. We adopted counsel's suggestion, and directed that the Registrar write to the incumbent and ask whether it disclaimed bargaining rights for persons regularly employed by the respondent for not more than twenty-four hours per week. By letter of its President dated May 24, 1988, the incumbent did so advise the Board, thereby putting to rest the concern referred to earlier in this paragraph.

4. Turning to the question whether the words "in the wage schedule of the agreement" should be included in the bargaining unit description, we note that the wage schedule in question sets out over 40 job classifications in six departments. After this list of departmentalized classifications, there appears a general classification of "GENERAL LABOURER Overall Plant." Article 17:02 of the collective agreement provides:

17:02 The Company also has the right to institute new jobs not now in existence. The Company shall confer with the Association in setting the rates for all new jobs.

5. After the pre-hearing vote was conducted and the time for filing submission in response to the Board's Form 71 notice had expired, we directed that the Registrar write to the parties as follows:

The panel observes that a unit limited to a list of job classifications would be inconsistent with the Board's usual approach to bargaining unit composition. The panel also notes the language of Article 17.02 of the agreement between the respondent and the incumbent, which appears to support the view that the words "described in the wage schedule of this Agreement" in Article 2 did not restrict the words "all of its employees" in that agreement so as to exclude bargaining rights for "new jobs."

In accordance with our direction, the Registrar offered the parties, and particularly the respondent, the opportunity to file further written submissions with respect to this issue in light of these observations, indicating whether or not an oral hearing was desired. The Registrar also indicated that in the absence of any further submissions, it was our inclination *not* to include the words "in the wage schedule of the agreement" in describing the appropriate bargaining unit.

6. The applicant's final position on this issue appears to be this: it would be appropriate to omit the words in issue from the bargaining unit description, but the applicant would be content to have those words included if it were clear that they do not restrict the words "all employees." Counsel for the respondent made the following submissions:

In our respectful submission, there is no basis for the Board's proposed amendment of the bargaining unit description contained in the incumbent Association's expired collective agreement. The parties to this application met and agreed upon certain modifications to that bargaining unit description and while the Applicant neither consented nor objected to the *continued* inclusion of the words "described in the wage schedule of the agreement" therein, we submit that, for the following reasons the bargaining unit description sanctioned by the Board should be that one described in paragraph seven (7) of the Board's April 21, 1988 decision for the following reasons.

It is generally accepted that, although the Board has the power to amend the bargaining unit description, in a displacement application, the applicant union inherits the bargaining unit described in the incumbent union's collective agreement. Reported Board cases which support this proposition are *Best View Holdings* [1981] OLRB Rep. September, p. 185, *Canada Cement Lafarge Ltd.* [1983] OLRB Rep. February, p.214, each of which refers to *Milltronics Limited*, [1980] OLRB Rep. January, p.56 and *Ontario Hydro* [1978] OLRB Rep. August, p.754.

In the particular circumstances of this case, the confusion concerning which employees the Applicant will represent has now been cleared up. further, the bargaining unit description acceptable to our client does not, in any way, grant less bargaining rights to the Applicant than those possessed by the Incumbent.

On the other hand, the Board's proposed deletion of the words "described in the wage schedule of the agreement" has the potential effect of expanding the scope of the bargaining unit which we submit is inappropriate in a displacement application unless sufficient reasons are demonstrated to the Board in support of such an amendment.

The Board is no doubt aware that in collective bargaining, the scope of the bargaining unit cannot be made the subject of an impasse between the parties. We submit that it would be patently unfair and unreasonable in the circumstances here for the Board to grant this amendment since the "offending" language in the present unit description could be made the subject of bargaining (although not pressed to impasse) between the parties. In effect, the Board would be granting a tactical advantage in bargaining to the Applicant should it issue the description you have indicated that it is disposed to.

Neither the applicant nor the respondent wishes an oral hearing.

7. The decision in *Bestview Holdings Limited*, [1983] OLRB Rep. Feb. 185, and the other decisions cited by counsel for the respondent do articulate the general proposition that, on an application for certification with respect to employees presently represented by a trade union, the appropriate bargaining unit is the unit of employees for which the incumbent trade union holds bargaining rights. In each of those cases the unit applied for did not include all of the existing employees for whom the incumbent had bargaining rights, and the contest was whether omitted employees constituted a separate bargaining unit or units. That is not the issue here. As the respondent would frame it, the issue here is whether the appropriate bargaining unit should have a scope *broader* than the single unit for which the incumbent holds bargaining rights.

8. Implicit in the last two paragraphs of the submissions we have quoted is the assertion that there are some currently unoccupied classifications of employee for which the incumbent does not have bargaining rights by reason of the words "described in the wage schedule of the agreement", and that the applicant would acquire bargaining rights for such employees if we did not use those words in describing the bargaining unit for which it will be certified in this application. If any question of the scope of the incumbent's bargaining rights had arisen between incumbent and respondent, it would have turned on an interpretation of Article 2 in light of all of the provisions of the collective agreement, including those to which we have referred in paragraph 4 of this decision. Viewed in that context, it would appear that the words "described in the wage schedule of this Agreement" in Article 2 did not restrict the scope of the words "all of its employees" in that Article so as to exclude bargaining rights for classifications which are neither listed in the wage schedule (otherwise than as "GENERAL LABOURER Overall Plant") nor expressly excluded by the balance of the language of Article 2. Counsel's submissions do not disclose the basis for his contrary assertions, nor do they identify the classification or classifications for which it is implied that the incumbent did not have bargaining rights.

9. On the view we take of the collective agreement, certification of the applicant for a bargaining unit defined without reference to the wage schedule in the incumbent's collective agreement would not give the applicant any bargaining rights which the incumbent did not have. If the scope of the incumbent's bargaining rights is less clear than it seems to us, that is all the more reason not to import that uncertainty into our bargaining unit description by including a reference to the wage schedule in the previous bargaining agent's last collective agreement.

10. Accordingly, we determine that the appropriate bargaining unit for the purpose of this application consists of

All employees of the respondent in the City of Brantford save and except forepersons, persons above the rank of foreperson, office, creative and sales staff, security guards, persons regularly employed for not more than 24 hours a week and students employed during the school vacation period.

The applicant is a trade union within the meaning of clause 1(1)(p) of the *Labour Relations Act*. We are satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

11. A certificate will issue to the applicant.

12. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement

requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

2795-84-U United Steelworkers of America, Complainant v. Shaw-Almex Industries Limited, Respondent v. Group of Employees, Interveners

Practice and Procedure - Reconsideration - Respondent moving for reconsideration of a portion of the Board's remedial order on the basis of remarks made by the courts - Court stating that it would have exercised its discretion differently but dismissing judicial review application - Board dismissing reconsideration request - Board cannot consider court's remarks to be judicial directions nor can it confer jurisdiction on the courts which they do not have - Board master of its own procedure

BEFORE: Harry Freedman, Vice-Chair, and Board Members R. J. Gallivan and J. Kennedy.

APPEARANCES: Brian Shell, Norm Carriere Joe Miles and Dennis Stevenson for the complainant; Michael Gordon and Johnathon Shaw for the respondent; no one appearing for the interveners.

DECISION OF THE BOARD; May 31, 1988

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[Paragraphs 1 to 5 omitted: Editor]

6. The Board made the following oral ruling at its hearing in this matter in Toronto on May 27th, 1988, after hearing submissions from counsel for the respondent and without calling upon counsel for the complainant to reply:

Counsel for the respondent has moved for reconsideration of a portion of our remedial order that was made on December 22, 1986 and subsequently amended on February 16, 1987 after a request for reconsideration was made at that time by counsel for the respondent. That portion of the order provides:

"We direct the respondent to compensate each of the striking employees for the loss of wages and benefits from December 13, 1984 to the earlier of either: (a) the date they ceased being an employee of the respondent on strike or (b) the date the respondent presents to the complainant a return to work protocol that does not discriminate between the employees hired after the commencement of the strike and the striking employees.

Additionally, we direct the respondent to compensate the complainant for the losses, if any, caused by the respondent's violation of sections 15 and 64.

The amount of compensation awarded includes interest in accordance with the Board's normal practice and is subject, of course, to the usual principles of mitigation."

Counsel for the respondent relies on two subsequent events to make this second request today:

- i) the reasons for judgment of the Divisional Court dismissing the application for judicial review of the Board's decision of December 22, 1986 and
- ii) comments to the effect that an application for reconsideration could be made at any time which were made by the Board's counsel in the Court of Appeal when the respondent sought and was denied leave to appeal the decision of the Divisional Court dismissing the application for judicial review.

We entertained the motion for reconsideration because of the representations from both counsel, but principally from counsel for the respondent, that collective bargaining between these parties may once again resume, and the request for reconsideration may have an influence on the course of that bargaining.

Counsel for the respondent made lengthy, thoughtful and careful submissions in support of his request. Since a prompt decision on the request is much more important than attempting to articulate counsel's detailed argument, we can only roughly describe what we understand to be the thrust of it.

Counsel, in essence, submitted that the Board's decision of December 22, 1986 changed the law of this province with respect to the rights of employers who have been legally struck by their employees and the duties owed by employers to their striking employees and the employees that have been hired as strike replacements. Since the law was changed, and because counsel for the respondent was under a misapprehension as to the scope of the original proceeding, the Board's compensation order is, in effect, unfair and is also an impediment to a fruitful collective bargaining relationship being re-established between these parties.

Counsel relies on the following passage in the reasons for judgment of the Divisional Court in *Shaw-Almex Industries Limited v. United Steelworkers of America*, (1988), 88 CLLC ¶14,007 at page 12,033-34:

"The applicant submits that the panel lost jurisdiction by failing to reconsider the question of remedy, except in a very limited way, after it became obvious that an exchange between the employer's counsel and the panel had left the employer's counsel with the impression that he would have a further opportunity to present evidence and submissions on remedy if the panel found against the employer on the merits.

It appears that the employer's counsel believed, in good faith, that he would have such a further opportunity, and there are some passages in his earlier exchange with the panel and with opposing counsel on which one can see how such a belief could arise and in which one can see some lack of clarity as to how things had been left. This court, had it been in the same position as the Board, would have exercised its discretion to allow further evidence and submissions on the question of remedy as soon as it became apparent that the applicant, in good faith, had been left with the impression that such opportunity would have been afforded.

The question, however, is not how we would have exercised our discretion had we been charged with the duties of the Board, but rather whether the Board lost jurisdiction by acting as it did. The majority of the panel, in making its decision not to reconsider the remedy issue, had before it a letter from applicant's counsel, which advanced with great force and clarity his position with respect to reconsideration.

It is obvious from the panel's reasons in refusing a full reconsideration that they had considered his submission. Although we would have exercised our discretion differently, there was a basis on which the majority of the panel could properly exercise their discretion as they did. We cannot say that they, after considering the reasons advanced by the applicant for reconsideration, lost jurisdiction by failing to grant an indulgence."

The Board, in its decision of February 16, 1987 did reconsider and amend paragraph 73(b) of its order of December 22, 1986 and also dealt with the issue upon which counsel relies. The Board wrote at paragraph 7 and 8 of that decision:

"Counsel for the respondent also submitted that the Board indicated to the parties that the Board would remain seized with determining the appropriate remedy and not damages only. Counsel has reproduced his notes of the exchange among counsel and the Board. His notes are consistent with our recollection of the exchange. The relevant portion of the exchange set out in counsel's notes is:

Gordon: Mr. Chairman, just before we adjourned, I gave the Board an undertaking from which I would like to be relieved. It has to do with the Board remaining seized of this matter.

Freedman: With respect to damages?

Gordon: Yes, I would wish not to agree that you remain seized on second thought.

Freedman: Assuming we are prepared to say that's fine, what's to stop the Board on its own motion to say that in this type of case, why shouldn't the Board remain seized?

Gordon: To be blunt, my friend has closed his case in chief and adduced no evidence on the subject.

Freedman: That's rather blunt. The name of the case, it escaped me, that dealt with the matter where there was a claim by party of insufficient evidence. The Board wouldn't go ahead whether the Board remained seized or not. The Board is content to allow you to withdraw your undertaking, however, the Board will remain seized of the matter. Even if Mr. Shell had proceeded to adduce evidence, we would have remained seized of it.

Gordon: I had not obtained instructions on this. I thank you, I'm fine now.

Freedman: All right, the Board will remain seized on the matter for damages notwithstanding the employer's lack of approval.

It was our intention at the time, and it is, in our view, clear from the exchange, that the Board was remaining seized with the issue of determining the quantum of damages, if it became necessary to do so. We did not suggest that we would remain seized with determining the appropriate remedy. We observe here that the question that counsel for the respondent wished to ask that went to the issue of remedy and which prompted the exchange set out above and to which counsel for the complainant objec-

ted was withdrawn. The Board did *not* rule on whether that question or questions along that line were relevant."

With respect, the majority of the Board, Mr. Gallivan dissenting, does not agree that the decision of December 22, 1986 changed the law in the way suggested by counsel. In our view, the *Labour Relations Act* has always required that employers deal with their employees, whether they are on strike or in any other situation, in a manner that does not discriminate against those employees because they exercised rights under the Act. We did not disagree with any previous Board decision on this point. Rather, it seemed to us that the focus of this case was much more on employer motivation whereas the decisions relied on by counsel, such as *Becker Milk Company Limited*, [1977] OLRB Rep. Dec. 797 and *Fotomat*, [1980] OLRB Rep. Oct. 1397, discussed at length in our December 22, 1986 decision, were principally focused on other issues.

As for the comments of the Court with respect to the manner in which we exercised our discretion, we refer to and adopt the following passage from *Knight Security Guards Limited*, [1970] OLRB Rep. June 377 at 379-382:

"The applicant further submits that '... In view of the opinion expressed by the four Judges, there is certainly reason to gravely doubt the correctness of the Board's decision and in particular its interpretation of section 9 [now section 12]. In our respectful submission, the Board is clearly in error. When an administrative tribunal such as the Board is given exclusive jurisdiction to determine all questions of fact or law that may arise in any matter before it and also is given the protection of a wide privative clause, it ought not refuse to reconsider its decision in circumstances such as these, especially when doubt has been cast upon it by a superior Court. There are, of course, no facts in dispute. The main issue is one of the proper legal interpretation to be given to section 9. A refusal by the Board to deal with the matter at this stage would, in our respectful submission, be tantamount to ignoring the considered opinion of the Courts on this matter, as well as ignoring any assistance or argument questioning its decision....'

...

The next matter to be dealt with is the applicant's renewed request that we reconsider our decision in the light of the comments made by the Courts.

Section 80 [now section 108] of the Act reads as follows:

'No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.'

The Court of Appeal has found that it has no jurisdiction in view of the preclusive effect of section 80 to 'review' the Board's decision. Since section 80 also precludes the Court from 'questioning' by the Board's decision, if section 80 is binding upon the Courts, by necessary implication the Courts must also have found by the same preclusive effect of section 80 that they have no jurisdiction to 'question' the Board's decision.

This Board, being a creature of the statute, receives its jurisdiction from the Act and must exercise its jurisdiction subject to the strictures of the Act. While the trial division and the appellate division of the Supreme Court of Ontario are courts of superior

jurisdiction, they are such only in matters falling within their competence. Section 79(1) [now section 106(1)] of the Act provides that 'the Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes...' This Board has been given exclusive jurisdiction with respect to the powers conferred on it. Accordingly, the Board has sole responsibility in matters falling within its competence, subject only to the limited areas where the Courts have exercised a power of review, e.g., where the Board has failed to exercise its jurisdiction or exceeds its jurisdiction.

As can be seen from the above, the Courts have not found that the Board has wrongfully exercised its jurisdiction which would entitle the Courts to review the Board's decision's in this case. The Board does not deem it advisable to consider the Court's remarks to be judicial directions in the instant case. If the Board were to decide otherwise, the Board would be acting contrary to the spirit and intent of section 80 by conferring jurisdiction on the Courts which section 80 clearly prohibits. In addition, to do so might place the Board in the position of attaching significance to the Courts' remarks, which the Courts did not intend.

If the Board were to accede to the applicant's request the Board would thereby give to the parties indirectly a right of appeal to or review by the Courts which is prohibited by section 80. Since the Act expressly prohibits review by the Courts, the Board ought not to circumvent the spirit and intent of section 79(1) and section 80 of the Act by cooperating with a party in order to enable that party to do indirectly what the party is prohibited from doing directly.

There is no doubt that the reasoned decisions of the Courts with respect to matters within their jurisdiction, even when expressed *obiter dicta*, are of great value in cases before the Board. However, such decisions are readily distinguishable from the use to which the applicant has requested the Board to make of the opinions expressed by the Courts in this case."

The Board is the master of its own procedure and in the circumstances of this case, we were and are satisfied that we were not unfair to the respondent. The parties are engaged in litigation over their respective rights under the Act. Litigation ensues risks to both sides, and one of those risks is the possibility that one side will face a risk of loss if its position is unsuccessful. We do not accept counsel's premise that we changed the law and therefore do not accept that the respondent should be relieved from the logical consequence of finding that it violated the Act, which ordinarily is a requirement to compensate those persons who have suffered a loss flowing from the violation.

In our opinion, our remedial order in paragraphs 73, 74 and 75 of our decision of December 22, 1986 as amended by our decision of February 16, 1987 is simply that, that is, an order to compensate for the losses caused by the respondent's violation of the *Labour Relations Act*.

Mr. Gallivan dissents. For the same reasons expressed in his dissent from the Board's decision of December 22, 1986, he would reconsider the compensation order in the way requested by counsel for the respondent.

0616-88-U Sutherland-Schultz Limited, Applicant v. United Brotherhood of Carpenters and Joiners of America, Local 785 and Karl Ball; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527, Al Steffler, Jim Hilker, Ted Benedict, Ron Hallman, Gary Arnott and Keith Acton; International Brotherhood of Electrical Workers, Local 804 Wayne Lehman, Walter Schlueter, David Worton and Peter Weber; International Union of Operating Engineers, Local 793 and Ron Hunt, Respondents

Construction Industry - Picketing - Strike - General contractor resubcontracting work to non-union employees in the face of the Carpenters' Union lawful province-wide strike - Carpenters' Union establishing picket line at subcontractor's primary job site - Picket line honoured by other unionized trades - Picketing of general contractor's job site by Carpenters' Union held to be in connection with a lawful strike - Application for a direction of unlawful strike dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chair.

APPEARANCES: *T. J. Billo, B. J. Houston and Robert Williams* for the applicant; *Douglas J. Wray and Karl Ball* for Carpenters, Local 785 and Karl Ball; no one appearing for the other respondents.

DECISION OF THE BOARD; June 10, 1988

1. This application for a direction under section 135 of the *Labour Relations Act* was heard on June 10, 1988. After hearing the evidence and representations of the parties, the Board orally dismissed the application. The Board's written reasons, which are an edited and somewhat expanded version of the oral reasons given at the hearing, follow.

2. At the outset of the hearing, the applicant advised the Board that it and the respondents, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527, Al Steffler, Jim Hilker, Ted Benedict, Ron Hallman, Gary Arnott and Keith Acton and International Brotherhood of Electrical Workers, Local 804, Wayne Lehman, Walter Schlueter, David Worton and Peter Weber, and International Union of Operating Engineers, Local 793 and Ron Hunt had agreed that the application would be adjourned *sine die* insofar as it concerned those respondents. Upon the Board expressing some doubt with respect to whether it was possible or appropriate to bifurcate the application in such a manner, the applicant sought and was granted leave to withdraw the application as against those respondents, without prejudice to its right to bring a new application against them.

3. There is no real dispute between the parties with respect to the facts relevant to this application. The applicant is the general contractor on an industrial, commercial and institutional ("ICI") sector construction project at the Waterloo Sewage Treatment Plant. The project, which has a mid-October 1988 completion date, involves a major expansion of the plant and repair to the existing facilities. The total value of the applicant's contract is approximately \$9.2 million. The applicant has subcontracted some of the work to other companies. There are a number of mechanical and civil trades involved in the work being done.

4. One of the subcontractors on the site is McCall Contractors Incorporated ("McCall"). The contract between the applicant and McCall calls for McCall to perform certain concrete form-

work as stipulated in the contract. Not all the formwork on the project was subcontracted to McCall.

5. McCall has a collective bargaining relationship with the respondent United Brotherhood of Carpenters and Joiners of America, Local 785 ("Local 785") through the province-wide collective bargaining scheme established by the *Labour Relations Act* for the ICI sector of the construction industry in Ontario.

6. McCall began its work on the project in mid-September 1987 and worked continuously on the site until on or about May 24, 1988 at which time the affiliated bargaining agents of the designated employee bargaining agency for carpenters and carpenters' apprentices employed in the ICI sector began a lawful strike. McCall stopped work immediately although its trailers and some other equipment remained, at the time of the hearing, on the site. None of the work which the applicant subcontracted to McCall was done between May 23 and June 2, 1988.

7. At the time of the work stoppage, McCall was already behind the schedule established, in its contract, for the formwork it was doing. In fact, its work should have been finished but was only seventy-five percent complete. After the stoppage, the applicant quickly became concerned about the impact that it would have on the progress of the project and, consequentially, on its contractual obligations to the owner (which is the Regional Municipality of Waterloo). It attempted but was unable to persuade Local 785 to supply carpenters (to McCall or itself) for the purposes of completing certain of McCall's work, which amounted to approximately five percent of the subcontract, the total value of which is approximately \$995,000. In that respect, I note that, I did not accept the applicant's suggestion that the work stoppage created by the carpenters strike created an "emergency" situation, within the true meaning of that term in the labour relations context.

8. In response to the situation, the applicant exercised what it viewed as its rights under the subcontract to, in effect, take that work, and only that work, away from McCall and subcontracted it to a non-union contractor, Laverty Equipment Supply ("Laverty"). Laverty began doing that work, using some of the equipment McCall had left behind on the site, on June 3, 1988.

9. Prior to June 3, 1988, Local 785 had not picketed the job site. Upon learning that employees of Laverty were doing the work that its members had been performing prior to the strike, Local 785 established a picket line across the sole access road to the project at approximately 2:30 p.m. the same day. That picketing continued, except on June 4, 1988, and was ongoing at the time of the hearing.

10. The unionized construction employees on the site, including pipefitters, operating engineers, electricians, and millwrights have honoured the picket line and refused to work, although it does appear that the applicant managed to arrange for some pipefitting, electrical, and operating engineer work to be done on June 9 and 10, 1988. The applicant has also experienced some difficulties with respect to the delivery of concrete as a result of the picket line which the truck drivers, members of the Teamsters union, are refusing to cross.

11. Sections 1(1)(o) and 135(1) of the Act provide that:

1.-(1) In this Act,

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(o) "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a

common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;

135.-1) Where, on the complaint of an interested person, trade union, council of trade unions or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike, or that employees engaged in or threatened to engage in an unlawful strike or any person has done or is threatening to do any act that the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike, it may direct what action, if any, a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

12. Of the decisions cited by counsel in argument, *Sarnia Construction Association*, [1982] OLRB Rep. June 922; *Consolidated Bathurst Packaging Limited*, [1982] OLRB Rep. Sept. 1274 and *Bird Construction Company Limited*, [1985] OLRB Rep. March 359 were of greatest assistance. In that regard, I note that of the cases cited by the applicant, *Horton CBI Limited*, [1985] OLRB Rep. June 880 dealt with a situation where a trade union which had no collective bargaining rights or relationship with the applicant employer and did not represent any employees on the job site, establish a picket line because it claimed that certain work being done by members of the Boilermakers' union was work within its trade jurisdiction, and *Acme Building and Construction Limited*, [1984] OLRB Rep. Aug. 1037 was a "recognition picket" situation. Accordingly, those decisions had little application to the issues in dispute in this case.

13. It is well established that a picket line can cause an unlawful strike within the meaning of the *Labour Relations Act*. Whether or not those unionized employees (other than carpenters) who have refused to cross Local 785's picket line have acted unlawfully was not an issue in this application subsequent to the withdrawal thereof as against all respondents other than Local 785 and Karl Ball. However, the evidence in this case does not suggest other than that the refusal of such employees to cross the picket line was other than concerted or based on a common understanding. Consequently, for the purpose of this application, I found that they were engaged in an unlawful strike.

14. There is no doubt that Local 785 established its picket line in order to stop the performance of what it considered to be its work. It also knew, or ought to have known, that other unionized employees were likely to refuse to cross the picket line and thereby engage in an unlawful strike, which is what happened. However, does the effect that Local 785's picket line had make it unlawful?

15. In *Sarnia Construction Association, supra*, the Board observed, at paragraphs 8 to 11:

8. However, the concept of picketing is in many ways regulated by the more general provisions contained in sections 74 and 76 of the *Labour Relations Act* and they must be interpreted with due sensitivity to the reality of the province-wide single trade bargaining created by the statute. We also accept that section 74 must be read in light of and subject to section 76 and the saving provision in that section, i.e. subsection 2. See *Canteen of Canada Ltd.*, *supra*, paragraph 25. Viewing this application under section 135 against these sections, we observe that it was not suggested or argued before us that the application, having been brought against a trade union and not against particular officers, officials or agents of the trade union, was technically unfounded. (See the respondent's filing on the first day this matter came on for hearing.) Rather, the matter was argued on its merits on the basis that the picketing was either sanctioned by section 76(2) or it was not and not that the applicants had chosen the wrong respondent(s). On this basis then, we are prepared to accept that by naming the respondent trade union the applicants were alleging that the officers, officials and agents of the local trade union in the general sense had sanc-

tioned the challenged picket line and thereby had procured or encouraged an unlawful strike within the meaning of section 74 and that the same actions (i.e. the setting up of the picket lines) by such persons amounted to acts which they would know or ought to know would cause other persons to engage in an unlawful strike within the meaning of section 76(1). From this perspective the conduct of setting up picket lines which cause unlawful strikes contrary to sections 74 and 76 can be remedied by the Board under section 135 as the procuring or encouraging of unlawful strikes by officers, officials and agents of a trade union provided the allegations are made out. At no time was it suggested that it was necessary for the applicants to name an official or officer or agent of Local 663 for the matter to be entertained under sections 74 and 76. Had the issue been raised the application might have been amended at the hearing since an officer of Local 663 had notice of this matter and attended the hearing.

9. Sections 74 and 76 do deal with the concept of picketing but do not mention it specifically. See Laskin, *The Labour Relations Amendment Act*, 1960, (1961-62), 14 U.T.L.J. 116 at 120. It is well recognized in this province that a picket line can cause an unlawful strike within the meaning of the Act. See *Nelson Crushed Stone*, [1977] OLRB Rep. Nov. 713. See also *Local 273, International Longshoremen's Ass'n v. Maritime Employers' Ass'n*, [1979] 1 S.C.R. 120 and Note, *Whether Honouring Picket Lines Constitutes a "Strike"* (1979), 11 Ottawa Law Review 771. There is no argument or evidence before us that the activity of those employees who recognized the respondent's picket lines was anything other than concerted or based on a common understanding within the meaning of the legislation. We are therefore prepared to find that the actions of these craft employees constitute an unlawful strike within the meaning of the Act in that the procedural condition precedents to calling a timely and otherwise lawful province-wide strike under the statute had not been complied with prior to the work refusals in question. It goes without saying that this finding is only for the purpose of this application. The application was not brought against such employees and there is therefore no need to decide whether our discretion under section 135 ought to be exercised with respect to them having regard to all of the industrial relations circumstances. See *Canadian Elevator Manufacturers*, [1975] OLRB Rep. Nov. 868 at para. 15. This then raises the question of whether the respondent can rely upon section 76(2) by arguing that the picket lines are in connection with a lawful strike and therefore protected.

10. We are satisfied that sections 74 and 76 are designed to deal with, among other things, picketing aimed at employers and employees wholly unconnected with a lawful strike. On the other hand, subsection 2 of 76 is aimed at permitting, among other things, picketing arising out of and related to a lawful strike. Some integrating and melding of purpose is therefore required in applying these various sections. Industrial relations experience has proven that neither purpose can be pursued to the exclusion of the other particularly in light of customs, practices and psychology surrounding the activity of picketing. Subsection 2 clearly protects, for example, picketing at a single employer location such as a plant or manufacturing setting where certain employees of the employer are on strike and picketing is aimed at fellow employees, suppliers, customers and others providing services to the struck enterprise. The Board has gone even further holding that picketing by employees on a lawful strike is permissible at locations of their employer other than the location at which they are employed. See *Canteen of Canada Limited, supra*, and *George Wimpey (Canada) Limited, supra*. Whether or not this approach has been too sweeping in its terms we do not need to decide on the facts before us. The causes for picketing are also infinite in variety as is the commercial activity which attracts picketing. Accordingly, broad general pronouncements are not very appropriate. See, for example, *Local 761, I.U.E. v. N.L.R.B.* (1961), 48 LRRM 2210; *Sailors' Union of the Pacific (Moore Drydock Co.)* (1950), 27 LRRM 1109; and Beatty, *Secondary Boycotts: A Functional Analysis* (1974), 52 Can. Bar. Rev. 388. The transfer of struck work from one location to another may present compelling reasons for expansive picketing whereas the picketing of another location involved in a totally different activity might have to stand or fall on the rationale that employees are entitled to picket an employer's entire economic domain. See *Williams v. Aristocratic Restaurants Ltd.*, [1951] S.C.R. 762; Brown, *Picketing: Canadian Courts and The Labour Relations Board of British Columbia* (1981), 31 U.T.L.J. 153. On the other hand, there can be little doubt that direct employee picketing of a geographically removed secondary employer's premises is not protected by section 76(2) subject possibly to considerations of a roving primary situs or ally considerations. See *Westcraft Manufacturing Ltd.*, [1975] 2 Can. LRBR 324 and Paterson, *Union Secondary Conduct: A Comparative Study of the American and Ontario Positions*, (1973), 8 U.B.C. Law Rev. 77 at 81. While it may be that a clearly secondary and uninvolved employer can come

before this Board for a direction to require his employees to cross the picket lines, such a remedy is not always entirely adequate particularly in relation to suppliers and others and we see little justification for placing the employees of a secondary employer in the dilemma of choosing between their loyalty to the labour movement and their legal obligations. Section 76 was designed to remove the source of the problem, i.e. employee directed secondary picketing. See *Arthur, Labour Law-Secondary Picketing-Per Se Illegality-Public Policy* (1963), 41 Can. Bar Rev. 573 at 584. It is only since the expansion of the Board's remedial authority that the problem has become one falling within the Board's responsibility. In this respect, we thing the reliance of *Canteen of Canada Ltd.* in *Ford Motor Co. of Canada Ltd. v. Browning* (1978), 86 D.L.R. (3d) 579 at 581 was understandable but not warranted. Accordingly, *Canteen of Canada* must be read in light of the instant decision.

11. Moreover, in the context of province-wide bargaining in the construction industry we are reluctant to hold that contractors working on a common construction site but otherwise unrelated to a dispute involving another trade also located there lose the protection provided for by sections 74 and 76(1). Nor, with the advent of province-wide bargaining, do we accept that section 76(2) permits unrestricted picketing directed at employees of employers unconnected with the labour relations dispute other than by geography provided that separate entrances can be established for such employees and provided further that the work of the striking trade or trades is not being performed. In embarking in this direction the Board must be sensitive to the custom and practices of trade unions and to the psychology permeating labour relations conflict. However, we see little justification for unrestricted common situs picketing in province-wide bargaining where the work of the striking employees is not being performed and the employers adversely affected are not connected with the negotiations. Such employers are not party to the negotiations and can have no real control on bargaining postures. Picketing directed at such employees and employers is in every sense secondary and not connected with a lawful strike. Indeed, we note that Hamilton and Toronto locals do not see a need to picket other craft employees even of multi-trade contractors unless their work is being performed. Thus, in the circumstances of this case, and where the picketing, either physically or visually, was not limited to single trade mechanical contractors and the common employer multi-trade contractors, we find and declare that the officers of the respondent trade union intended to cause an unlawful strike of trades employees employed by employers who are not part of the mechanical trades negotiations and that, to the extent that the picketing is directed at and interfering with such employees, the picketing cannot be said to be in connection with a lawful strike. However, on the very limited facts before us, we are not prepared to say that the multi-trade contractors involved in bargaining with the employee bargaining agency of the respondent local may also seek protection under sections 74 and 76(1). While there may be additional detail and argument on how the construction industry is different than a normal industrial setting where various employee groups of a single employer are employed in proximity to each other and therefore properly subjected to picketing, we are not prepared to distinguish the construction industry in this respect at this time. This case should not be taken as a signal to parties outside the ambit of province-wide construction industry negotiations to begin establishing reserved gates in an effort to insulate themselves from primary picketing. This decision is very much centered on the needs and practices of a particular segment of the construction industry. Finally, because of the somewhat unprecedented nature of this application, we view our findings as speaking to the future and no other relief is justified for what has occurred to date.

At paragraphs 22-27 of *Consolidated Bathurst Packaging Limited, supra*, the Board said that:

22. Sections 74 and 92 must be interpreted in the context of the other provisions of the statute and of industrial relations practices. Similarly, the Board's discretion under section 92 must be exercised in the light of these same considerations. It is from this perspective that the Board has said that section 74 must be read and applied with due regard to the legislation policy expressed in section 76. See *Canteen of Canada Limited*, [1978] OLRB Rep. Mar. 207. Picketing is a traditional method employed by workers to publicize their employment disputes and to attract support. *If section 74 was applied literally by this Board, picketing at their workplace by employees lawfully on strike would be restrained if honoured by other employees of the struck employer or by the employees of suppliers providing goods and services to the struck location. Section 76(1) is aimed more broadly and directly at picketing in that it applies to "persons" as opposed to trade union officials and requires only the finding that persons will engage in an unlawful strike as the probable and reasonable consequence of the picketing and not that an unlawful strike has*

occurred. However, by section 76(2) the Legislature has made it clear that it does not intend to restrain picketing done "in connection with a lawful strike". In other words, accommodation is made for the traditional exercise of picketing conduct. This Board has therefore read section 74 in light of section 76(2) and declined to restrain, under either section 92 or 135, the involvement of union officials in picketing properly associated with a lawful strike. This case, like *Sarnia Construction Association*, raises the issue of the scope of picketing envisaged and permitted under the Act. Is this picketing in connection with a lawful strike within the meaning of the Act?

23. Ontario has not chosen to provide a detailed code for picketing such as exists in the Province of British Columbia. Rather, more like the *National Labor Relations Act*, the Act begins with the premise that all actions causing unlawful strikes are themselves unlawful and then a very general exemption is provided for "any act done in connection with a lawful strike" to accommodate labour's traditional exercise of picketing activity. Prior to the enactment of section 20 of the *Judicature Act* and the Board's cease and desist remedial jurisdiction, section 76(2) was largely irrelevant. Ex parte, interim and final injunctive relief was available in the courts in actions brought against picketers and framed in common law terms. Section 76(2) simply was a defense to a prosecution under the Act but was not seen as founding a positive statutory right. However, the courts did try to rationalize common law tort and contract laws with lawful strike action and important accommodations were made for picketing arising out of an otherwise lawful strike and confined to the primary work location. See *Tenen Investments Ltd. v. Wueller* (1966), 66 CLLC ¶14,151; *Lescar Construction Co. Ltd. v. Wigman*, [1969] 20 O.R. 846; *Refrigeration Supplies Co. Ltd., v. Ellis et al* (1970), 14 D.L.R. (3d) 682; *Falconbridge Nickel Mines Ltd. v. Tye, Boundreau, et al* (1971), 71 CLLC ¶14,101. Secondary picketing - the picketing of an innocent third party to a labour dispute - was clearly unlawful both at common law and under the *Labour Relations Act*. See *Hersees of Woodstock Ltd. v. Goldstein et al*, [1963] 2 O.R. 81.

24. However, the situation in the courts with respect to labour relations conflict was significantly affected by the passage of section 20 of the *Judicature Act*. This enactment sets down stringent rules for the availability of injunctive relief in a labour dispute. "Labour dispute" is defined very broadly and, in such a dispute, an injunction is only available if the court is satisfied "that reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry upon or exit from the premises in question or breach of the peace have been unsuccessful". See the *Judicature Act* R.S.O. 1980, C. 223 as amended s. 20(e). The history behind this section bears some resemblance to the forces in the United States giving rise to the *Clayton Act of 1914* and the *Norris-LaGuardia Act* of 1932. However, Ontario courts have had to interpret the meaning of "labour dispute" to determine the application of section 20 and have held that picketing directed at neutral third parties or at employers not connected with a labour dispute falls outside the section and is amenable to injunctive relief. *But in so holding, the courts have tried to ensure that an applicant has not involved himself in a labour dispute*. See *Commonwealth Holiday Inns of Canada v. Sunday et al*, [1974] 2 O.R. (2d) 601; *Alex Henry & Son Ltd. v. Gale et al*, [1976] 14 O.R. (2d) 311; and, generally, *Beatty, Secondary Boycotts: A Functional Analysis* (1974), 52 Can. Bar Rev. 388.

25. At the very time the courts were being restrained in their involvement in labour disputes, this Board was being given more extensive remedial powers to control and regulate all forms of industrial relations conflict. Indeed, this jurisdiction was recognized by the court with respect to picketing. See *Nadofsky Steel Erecting Ltd. v. Doyle* [1973] 30 R. 515, 37 D.L.R. (3d) 343. In the case of picketing, general substantive guidelines were already in place and this new remedial jurisdiction therefore provided the labour relations community with an alternative forum to the courts. The Board's substantive mandate clearly differs from that of the courts and it cannot be said the two jurisdictions are congruent. For example, see the outcome of *Sarnia Construction Association*, *supra*. However, cases decided under section 20 of the *Judicature Act* involve a somewhat similar balance of competing factors and can provide useful guides in particular cases. This Board is obligated to determine whether "the act done" (i.e. picketing) is "in connection with a lawful strike". One interpretation might be that as long as the picketers are on lawful strike somewhere in Ontario they can picket anyone and anywhere else without restriction by this Board. We do not, however, believe that the Legislature intended to insulate picketing to this extreme extent. Rather, the emphasis of section 76(1) is on affording positive protection against picketing. Reading subsection (1) and (2) together, we believe the Legislature intended

to protect innocent third parties from the effects of labour disputes while, at the same time, accommodating the traditional actions of employees involved in lawful strike action, i.e. picketing. To use the classic jargon of this area of labour relations, the Legislature has attempted to maintain a balance between the rights of unions to engage in primary activity and the rights of secondary employers to remain free from the direct involvement in the disputes of others. A similar balance arises out of the secondary boycott provisions of the *National Labor Relations Act* in the United States wherein section 8(b)(4)(B) prohibits secondary boycotts, as Senator Taft put it, “to injure the businesses of a third person who is wholly unconcerned in the disagreement between an employer and his employees.” See 93 Cong. Rec. 4198 (1947); *Levin, supra*, page 285. It has been for the NLRB to determine whether any particular employer, complaining of unlawful secondary boycott activity, is in fact wholly unconcerned. Exercising a somewhat analogous function, this Board is required to determine whether particular actions complained of are done in connection with a lawful strike understanding that s. 76(2) does not sanction action directed at a person or employer wholly unconcerned in a disagreement between another employer and his employees. Picketing directed at a neutral third party is not in connection with a lawful strike occurring between other parties within the meaning of the subsection. Such actions may, depending on the circumstances, violate both sections 76(1) and 74 and can be remedied under sections 89 and 92.

26. Thus, in *Sarnia Construction Association, supra*, the Board found that picketing at construction sites by a striking trade union *when the work of the trade was not being performed* could only have the purpose of being aimed at employers and employees unconnected with the dispute except by geographical proximity. Accordingly, from this viewpoint, the Board ruled that the picketing was not in connection with a lawful strike and instructed that gates be erected form the employees of these neutral employers. The striking trade was prohibited from picketing these gates as long as *their work was not being performed*.

27. In this case we must also determine whether the applicant is truly a neutral party. In the United States “the ally doctrine” was developed under section 8(b)(4)(B) to characterize third parties who had involved themselves in a labour dispute of others and who were therefore not entitled to the protection of the secondary boycott provision. For example, *if a struck employer hires strike breakers, these persons can clearly and properly be subjected to picketing. If the struck employer instead contracts out his struck work to another employer at premises remote from the dispute, to preclude the striking employees from picketing at the new location where the work is being performed would render the strike right illusory. Moreover, the secondary employer who receives the struck work is obviously not an innocent bystander for whom either 8(b)(4)(B) of the National Labor Relations Act or s. 76(1) and S.74 of the Labour Relations Act were designed. Such a secondary employer is therefore to be viewed as standing in the shoes of the primary employer and is a proper target for picketing.* Reference to this doctrine was made at paragraph 10 of the *Sarnia Construction Association* decision and it is the application of this doctrine that is in issue in the facts at hand. A review of a number of cases relied on by the respondents provides a useful prelude to the characterization of the applicant as either a neutral or an ally.

[emphasis added]

Finally, in dismissing the application under section 135 in *Bird Construction Company Limited, supra*, the Board observed, at paragraphs 34-37 that:

34. In *Sarnia Construction Association*, the strike was not directed against either a general contractor or the owner-client of the site. The picketing was directed at other specialty subcontractors who were wholly unconcerned with the dispute, did not, by their actions contribute to the economic strength or bargaining position of the struck employers, and were in fact on the site only by accident of time and geography. Their activities did not affect the work opportunities of the striking workers, nor obviously assist the struck employers either economically or in their tactical ability to resist the strikers’ demands. The work of the strikers remained undone, to be completed when the dispute was over. The purpose of picketing these neutrals was to put pressure on them and perhaps the general contractors to encourage the struck mechanical subcontractors to make concessions. It was a form of pressure which the Board considered “secondary” or unconnected with the direct dispute. However, the Board was careful to limit its opinion to the unique facts of the case and circumstances of the construction industry, and even reserved

judgement on whether a multi-trade contractor (i.e. a firm with contractual relationships with various trade unions) could be picketed by one of those unions, thereby inducing the others to respect the picket line and engage in a work stoppage. The Board was not prepared to extend its analysis to a manufacturing setting where it was recognized that otherwise lawful primary picketing may be aimed at: "fellow employees, suppliers, customers, and *others providing services to the struck enterprise*". The Board was not prepared to qualify or undercut the general proposition (and understanding in this province) that *prima facie*, at least, striking workers are entitled to picket the premises of their employer.

35. In the instant case the situation is quite different from that in *Sarnia Construction Association* even though the issue before the Board is the same: can the impugned picketing activity properly be said to be "in connection with" the lawful lockout currently imposed by Carling on the members of Local 325 of the Brewery Workers Union? I must conclude that it is. Indeed, I do not see how I could reach any other conclusion if the words "in connection with" are to be given their ordinary meaning. To adopt the applicants' submission that the picketing here is *not in connection with* the lockout, I would have to totally ignore the facts.

36. The picketing here would not occur at all were it not for the existence of a lawful strike or lockout. The picketing is occurring at the locked out employees' own work site, not some geographically remote location of a neutral wholly unconcerned third party. All of the activities interfered with are of direct and immediate business benefit to Carling, and are being performed on its premises and for its benefit at the same time that Carling has locked out its own employees. In *Sarnia Construction Association* it was difficult to identify any benefit the struck contractors were deriving from the continuation of work by the "neutral" contractors, but that is certainly not the case here. On the face of it, Carling would appear to be as directly affected by a delay in the preparation of a profit-making addition as it is by the cessation of the production process. In both instances the loss suffered relates to the tying [sic] up of a capital investment and the prospective loss of custom. Why should one be subject to picketing and not the other when both are occurring at the employees' immediate work place? I find it difficult to distinguish the construction services here provided to Carling by the applicants, and the services supplied by suppliers or others who may have occasion to come to the location of the work stoppage for purpose of doing business. These factors, in themselves, might be sufficient to warrant a refusal by this Board to interfere with the picketing. But those are certainly not the only facts in this case which would support that conclusion.

37. Carling is not a passive owner-client, but is acting as its own general contractor in respect of at least certain phases of the construction programme, with its own direct relationship with construction subcontractors, and, since December 1984, its own responsibility for the maintenance of safety standards and the rectification of safety problems arising from the construction work. The construction workers (including those employed by Carling's own direct subcontractors) are performing services for Carling at Carling's work site which are directly related not only to the issues raised in this particular strike, but also to the parties' relative bargaining positions and the ability of Carling to meet its projected production and market requirements. In locking out the employees, Carling is denying its workers present work opportunities as it is lawfully entitled to do, but in proceeding with its automation programme Carling is also limiting its employees' ability to respond to that programme in bargaining, and may well be effectively influencing its employees' future work opportunities. One of the purposes of the picketing, and perhaps the main purpose of picketing the construction gate, is to interrupt a process which the union reasonably believes will substantially reduce the work opportunities available at the Carling plant. This is not a case like *Sarnia Construction Association* where the activities of the so-called neutral subcontractors do not bear upon the work opportunities of the struck employer or its immediate advantage in resisting the union's demands in the strike. As I have already noted, long-term job security is what the dispute is all about. In all of these circumstances, I do not see how this Board can sensibly say that the picketing is not "in connection with" the lockout, even though the picketing at the construction gate may well cause the employees of the construction contractors to breach their own legal obligation to work and induce them to engage in an unlawful work stoppage.

(See also *Nickel Mines Ltd. v. Tye, Boudreau, Genereux et al* (1971) 71 CLLC ¶14,100 (Ont. S.C.).)

16. I agreed with those comments and also observe that the Supreme Court of Canada has suggested that picketing is a protected activity in this country (see *Retail, Wholesale and Department Store Union, Local 580 et al v. Dolphin Delivery Ltd.*, (1986) 33 D.L.R. (4th) 174 at p. 187 per McIntyre J.).

17. In this case, McCall is still on the job site. The work that its employees, who are members of Local 785, were doing prior to May 24, 1988 is now being done, at the instance of the applicant, by non-union employees in the face of the carpenters' lawful province-wide strike in the ICI sector of the construction industry. Local 785 established a picket line at McCall's primary job site only when the struck work began to be done. I found it unnecessary and inappropriate to comment on the contractual rights that exist as between the applicant and McCall. They have not settled that issue between themselves and the forum for adjudicating a dispute with respect thereto is not the Board. In the context of this application, it was my view that, by attempting to avoid the effect of the carpenters' strike by resorting to what it perceived to be its rights under its contract with McCall, the applicant involved itself in that labour dispute. Accordingly, it was not open to the applicant to plead that it is an innocent bystander. Further, I observed that if such an avenue was open to parties in the position to the applicant (like for example, the owner of the Dome Construction in Toronto) it would have very far reaching consequences, including, arguably at least, making a trade union's right to strike and to picket in support thereof largely illusory.

18. In my view, the picketing of the applicant's job site by Local 785 was in connection with a lawful strike within the meaning of section 76(2) of the *Labour Relations Act* as that provision has been interpreted and applied by the Board. For all of the foregoing reasons, this application was dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1988

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0567-87-R: Ontario Nurses' Association (Applicant) v. Nipigon District Memorial Hospital (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at Beardmore and in the respondent's Home Care Program at and out of Nipigon, save and except Nursing Supervisor and persons above the rank of Nursing Supervisor and employees for whom any trade union held bargaining rights as of the 27th day of May, 1987" (6 employees in unit)

0878-87-R: Labourers' International Union of North America, Local 607 (Applicant) v. Vibration Assessment Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in all sectors of the construction industry in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0915-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. 590308 Ontario Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in all other sectors in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, and the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit) (*Having regard to the agreement of the parties*)

2300-87-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Sirfran Construction Managers Inc. (Respondent)

Unit: "all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all glaziers and glaziers' apprentices in the employ of the respondent in all sectors of the construction industry, other than the industrial, commercial and institutional sector, in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (*Having regard to the agreement of the parties*)

2376-87-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. DJ's Nepean Taxi Company Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all owner-operators/dependent contractors of the respondent working as taxi drivers in the Cities of

Nepean and Kanata, save and except dispatchers, persons above the rank of dispatcher, office and clerical staff, and bus drivers" (49 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Notes*)

Unit #2: (see *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*)

2724-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Wycliffe Management Services Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2844-87-R: Teacher Assistants Association of the Waterloo County Board of Education (Applicant) v. The Waterloo County Board of Education (Respondent) v. Salaried Teachers Association (Intervener) v. Group of Employees (Objectors)

Unit: "all persons employed by the respondent as teacher assistants in the Regional Municipality of Waterloo, save and except employees in bargaining units for whom any trade union held bargaining rights as of January 19, 1988" (223 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3058-87-R: Canadian Union of Public Employees (Applicant) v. The Hastings & Prince Edward Counties Health Unit (Respondent)

Unit: "all employees of the respondent in the Counties of Hastings and Prince Edward, save and except supervisors, persons above the rank of supervisor, senior public health inspectors, payroll and accounting clerk, secretaries to Medical Officer of Health, Director of Administration, Director of Dental Services, Director of Community and Mental Health, Director of Nursing, Director of Public Health Inspection, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of date of application" (64 employees in unit)

3321-87-R: United Steelworkers of America (Applicant) v. Renfrew Tape Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Town of Renfrew, save and except forepersons, persons above the rank of foreperson, office and sales staff" (56 employees in unit) (*Having regard to the agreement of the parties*)

3335-87-R: Ontario Secondary School Teachers' Federation (Applicant) v. Grey County Board of Education (Respondent)

Unit: "all employees of the respondent in Grey County employed as speech and language pathologists, psychometrists and psychologists, save and except psychologists/supervisors and persons above the rank of psychologist/supervisor" (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3433-87-R: Federation of Teachers in Hebrew Schools (Applicant) v. Netivot Hatorah Day School (Respondent)

Unit: "all teachers employed as Judaic Studies teachers by the respondent in the Municipality of Metropolitan Toronto, save and except principals and persons above the rank of principal" (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3443-87-R: Labourers' International Union of North America (Applicant) v. 492786 Ontario Ltd. c.o.b. as Aries Construction, and Aries Construction Management Ltd. (Respondents) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit) (*Having regard to the agreement of the parties*)

3448-87-R: Service Employees' International Union, Local 478 (Applicant) v. Alert Care Corporation (Respondent)

Unit: "all employees of the respondent in Gravenhurst regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and professional nursing staff" (8 employees in unit) (*Having regard to the agreement of the parties*)

3514-87-R: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Bronson Bakery Ltd. (Respondent)

Unit: "all route drivers employed by the respondent in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3519-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (Applicant) v. Spun Steel, Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff and persons employed in Spun Steel Engineering Centre" (60 employees in unit) (*Having regard to the agreement of the parties*)

3534-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Bingham-International Inc. (Respondent)

Unit: "all employees of the respondent in the City of Cambridge, save and except foremen, persons above the rank of foreman, office, sales and technical staff" (44 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3544-87-R: Bakery, Confectionery & Tobacco Workers International Union, Local 264 (Applicant) v. Pro Pastries Inc. (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (97 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3562-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Darwin W. Jones c.o.b. as Gem Contracting (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

3570-87-R: Office & Professional Employees International Union (Applicant) v. Labour Council of Metropolitan Toronto & York Region (Respondent)

Unit: "all employees of the respondent at the Metro Labour Education and Training Centre in the Municipality of Metropolitan Toronto, save and except Project Director and persons above the rank of Project Director" (48 employees in unit) (*Having regard to the agreement of the parties*)

3583-87-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Applicant) v. Pellus Manufacturing Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Comber, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (12 employees in unit) (*Having regard to the agreement of the parties*)

3585-87-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Stephenson Cafeteria of Canada Inc. (Respondent)

Unit: "all employees of the respondent in the City of Chatham, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and persons regularly employed for not more than 24 hours per week" (19 employees in unit) (*Having regard to the agreement of the parties*)

0014-88-R: United Steelworkers of America (Applicant) v. Almax Industries (1980) Ltd. (Respondent)

Unit: "all employees of the respondent at Lindsay, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, laboratory technicians, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (48 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0033-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. N. A. Carpenters Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

0046-88-R: Service Employees Union, Local 183 (Applicant) v. Sisters of St. Joseph of the Diocese of Peterborough (Respondent) v. Group of Employees (Objectors)

Unit: "all lay employees of the respondent at 1545 Monaghan Road, Peterborough, save and except supervisors, persons above the rank of supervisor, office and clerical staff, registered and graduate nurses, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (20 employees in unit) (*Having regard to the agreement of the parties*)

0048-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Facca Construction Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0055-88-R: Ontario Nurses' Association (Applicant) v. Extendicare Health Services Inc. (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at its nursing home in Mississauga, save and except Director of Care, persons above the rank of Director of Care and persons regularly employed for not more than 24 hours per week" (5 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent at its nursing home in Mississauga regularly employed for not more than 24 hours per week, save and except Director of Care and persons above the rank of Director of Care" (8 employees in unit) (*Having regard to the agreement of the parties*)

0066-88-R: United Rubber, Cork, Linoleum & Plastic Workers of America, AFL:CIO:CLC (Applicant) v. Bridgestone (Canada) Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality of Peel, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit) (*Having regard to the agreement of the parties*)

0067-88-R: Energy & Chemical Workers Union (Applicant) v. J. & P. Coats (Canada) Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Kingston, save and except forepersons, persons above the rank of foreperson, office, clerical, technical and sales staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (105 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0082-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Gary McPherson & Sons Construction (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0086-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (Applicant) v. Ronal Canada Inc. (Respondent)

Unit: "all employees of the respondent in Stevensville, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than 24 hours per week" (106 employees in unit) (*Having regard to the agreement of the parties*)

0090-88-R: Teamsters, Local 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Sony of Canada Ltd. (Respondent)

Unit: "all employees of the respondent in Whitby, Ontario save and except foremen, persons above the rank of foremen, office, technical and sales staff, and students employed during the school vacation period" (23 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0099-88-R: Bakery, Confectionery & Tobacco Workers International Union, Local 264 (Applicant) v. Aloro Foods Inc. (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except plant manager, persons above the rank of plant manager, office and sales staff, technical services manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (39 employees in unit) (*Having regard to the agreement of the parties*)

0117-88-R: Ontario Nurses' Association (Applicant) v. Craigholme Nursing Home (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at Ailsa Craig, save and except Director of Nursing and persons above the rank of Director of Nursing" (7 employees in unit) (*Having regard to the agreement of the parties*)

0121-88-R: Christian Labour Association of Canada (Applicant) v. Babcock Nursing and Rest Homes Ltd. (Respondent)

Unit: “all employees of the respondent at its Babcock Rest Home in Wardsville, save and except Administrator, Director of Nursing, supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical” (16 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0125-88-R: Ontario Public Service Employees Union (Applicant) v. St. Joseph’s Hospital, Hamilton (Respondent)

Unit: “all registered and non-registered medical technologists employed in the St. Joseph’s Hospital, Hamilton, Medical Laboratories for not more than 24 hours per week and students so employed during the summer vacation period, save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements between St. Joseph’s Hospital, Hamilton and Ontario Nurses’ Association and between St. Joseph’s Hospital, Hamilton and Local 786, Canadian Union of Public Employees” (17 employees in unit) (*Having regard to the agreement of the parties*)

0143-88-R: Graphic Communications International Union, Local 500M (Applicant) v. Fieldstone Graphics Inc. (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff” (10 employees in unit) (*Having regard to the agreement of the parties*)

0166-88-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Friendly Plumbing Services Ltd. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit) (*Clarity Note*)

0178-88-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Leslie & Palmer Co. Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0190-88-R: Hotel Employees, Restaurant Employees Union, Local 75 (Applicant) v. 578994 Ontario Ltd. c.o.b. as Journey’s End (Brampton) Motel (Respondent)

Unit: “all employees of the respondent in the City of Brampton, save and except assistant manager, persons above the rank of assistant manager, office and clerical staff, front desk staff and students employed during the school vacation period” (11 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0194-88-R: Teamsters, Local 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Reimer Express Lines Ltd. (Respondent)

Unit: “all dependent contractors of the respondent at its Fastpac Division in the City of Mississauga, save and except dispatchers, persons above the rank of dispatcher, office, clerical and sales staff, persons regularly

employed for not more than 24 hours per week and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*)

0196-88-R: Amalgamated Clothing & Textile Workers' Union (Applicant) v. Levi Strauss & Co. (Canada Inc. (Respondent)

Unit: "all employees of the respondent at 90 Clairville Drive in the Municipality of Metropolitan Toronto, save and except foreperson, persons above the rank of foreperson, office and sales staff, laboratory staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of April 22, 1988" (27 employees in unit) (*Having regard to the agreement of the parties*)

0199-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Agostino Passavia Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

0203-88-R: Service Employees' International Union, Local 204 affiliated with the S.E.I.U., AFL:CIO:CLC (Applicant) v. Toronto Hospital (Respondent) v. Canadian Union of Public Employees (Intervener #1) v. Ontario Public Service Employees Union (Intervener #2)

Unit: "all registered nursing assistants employed by Toronto Hospital, Toronto General Division, at its University Avenue Complex in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of April 25, 1988" (79 employees in unit)

0208-88-R: United Steelworkers of America (Applicant) v. Franklin Electric of Canada Ltd. (Respondent)

Unit: "all employees of the respondent in the Township of Adelaide, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (218 employees in unit) (*Having regard to the agreement of the parties*)

0211-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Parc Developments Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0214-88-R: International Brotherhood of Painters & Allied Trades, Local 1832 - Glaziers (Applicant) v. Ross Glass & Mirror Inc. (Respondent)

Unit: "all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all glaziers and glaziers' apprentices in the employ of the respondent in all other sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

3160-87-R: London & District Service Workers' Union, Local 220, SEIU, AFL:CIO:CLC (Applicant) v. Kitchener-Waterloo Hospital (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Kitchener, save and except professional medical staff, graduate nursing staff, undergraduate nurses, paramedical personnel, office and clerical staff, supervisors, persons above the rank of supervisor, chief engineer, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of February 17, 1988" (696 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	456
Number of persons who cast ballots	369
Number of ballots marked in favour of applicant	185
Number of ballots marked against applicant	184

3283-87-R: International Woodworkers of America (Applicant) v. Unitized Manufacturing Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except forepersons, persons above the rank of foreperson, watchman and office and sales staff" (32 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of The Lumber & Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America	1

3425-87-R: United Food & Commercial Workers International Union (Applicant) v. G. T. Lanning Ltd. (Respondent) v. United Garment Workers of America (Intervener)

Unit: "all employees of the respondent in its Bell Shirt Division at its plant in Belleville, save and except foremen and foreladies, those above the rank of foreman and forelady, office staff, sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period" (45 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	44
Number of persons who cast ballots	41
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	37
Number of ballots marked in favour of intervener	3

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

3218-87-R: Communications & Electrical Workers of Canada (Applicant) v. Dominion Electric Protection Company c.o.b. as ADT Security Systems (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit: "all employees of the respondent working in the electric protection industry at and out of the respondent's Central Ontario offices in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, technicians, customer service and relations representatives, data clerks, collectors, persons in a co-operative training programme in a recognized university or college, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of February 29, 1988" (123 employees in unit)

Number of names of persons on revised voters' list	122
Number of names of persons who cast ballots	105
Number of ballots marked in favour of applicant	95

Number of ballots marked in favour of intervener	10
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Applications for Certification Dismissed Without Vote

1893-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Nekison Engineering & Contractors Ltd. (Respondent)

2231-87-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Fish General Contractors Ltd. and Arthur J. Fish Ltd. (Respondent) (11 employees in unit)

2896-87-R: Ironworkers District Council of Ontario (Applicant) v. Plescia Iron Works Ltd. (Respondent) (10 employees in unit)

3172-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. William O'Neill Construction & Equipment Ltd. (Respondent) v. Group of Employees (Objectors) (20 employees in unit)

3447-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Canada Blue Tanning Company Ltd. (Respondent) v. United Food & Commercial Workers International Union, United Food & Commercial Workers - Region 18, Canada, and Ontario Council of Leather Workers, Local 0-116, Cobourg (Intervener) (26 employees in unit)

0057-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Doorset Carpentry (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener) (3 employees in unit)

0110-88-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Applicant) v. Lafarge Canada Inc. (Respondent) (2 employees in unit)

0173-88-R: Ontario Nurses' Association (Applicant) v. Victorian Order of Nurses (Respondent) (365 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2471-87-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Lay-All Drywall Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (28 employees in unit) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	32
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	15

3243-87-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Fidelitas Holding Company Ltd. (Respondent)

Unit: "all employees of the respondent in Ottawa, save and except department heads, persons above the rank of department head, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (51 employees in unit)

Number of names of persons on list as originally prepared by employer	45
Number of persons who cast ballots	38
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	32
Number of segregated ballots cast by persons whose names appear on voters' list	6
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	25
Ballots segregated and not counted	6

3438-87-R: United Steelworkers of America (Applicant) v. Canada Hair Cloth Co. Ltd. (Respondent) v. Canada Hair Cloth Employees' Association (Intervener)

Unit: "all employees of the respondent in the City of St. Catharines, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (80 employees in unit)

Number of names of persons on revised voters' list	75
Number of persons who cast ballots	74
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	73
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	36
Number of ballots marked in favour of intervener	37

3462-87-R: United Steelworkers of America (Applicant) v. Renabie Gold Mines Ltd. (Respondent)

Unit: "all employees of the respondent in the Townships of Leeson, Brackin, Rennie and Stover, save and except forepersons, persons above the rank of foreperson, office, sales and metallurgy staff, employees in the engineering and geological departments and students employed during the school vacation period" (143 employees in unit)

Number of names of persons on list as originally prepared by employer	145
Number of persons who cast ballots	115
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	113
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	78
Ballots segregated and not counted	2

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0166-87-R: Paul Petrus (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 3054 (Respondent) v. Huron Steel Fabricators (London) Ltd. (Intervener)

Unit: "all employees of the employer employed in London, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period" (161 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	8

2329-87-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Colonial Furniture (Ottawa) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all office and clerical employees of the respondent employed in the City of Ottawa, save and except

assistant supervisors, persons above the rank of assistant supervisor, sales staff, buyers, advertising staff, and secretaries employed in a confidential capacity with respect to labour relations" (43 employees in unit)

Number of names of persons on list as originally prepared by employer	39
Number of persons who cast ballots	36
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	26

2376-87-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. DJ's Nepean Taxi Company Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all persons employed as taxi drivers by the respondent in the Cities of Nepean and Kanata, save and except dispatchers, persons above the rank of dispatcher, office and clerical staff and bus drivers" (36 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Notes*)

Number of names of persons on revised voters' list	51
Number of persons who cast ballots	39
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	24

3064-87-R: United Steelworkers of America (Applicant) v. A. Gold & Sons Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Township of Raleigh, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period" (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	14

Applications for Certification Withdrawn

0539-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Rovan Paving Ltd. (Respondent)

1150-87-R; 1151-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Sanick Construction Co. Ltd., 681649 Ontario Ltd. c.o.b. as New Investment Carpentry (Respondent)

1318-87-R: Lake Ontario District Council, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Jack Law Contractors Ltd., Jack Law Contractors Inc., Jack Law Construction Ltd., Law Construction & Jack Alvin Law (Respondent)

2882-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Applicant) v. J.N.B. Plumbing & Heating (Respondent)

3103-87-R: United Steelworkers of America (Applicant) v. Bibby Ste. Croix Foundaries Inc. (Respondent) v. Group of Employees (Objectors)

3161-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. R. M. Belanger Ltd. (Respondent) v. Group of Employees (Objectors)

3303-87-R: Ontario Public School Teachers' Federation (Applicant) v. The Waterloo County Board of Education (Respondent) v. The Teacher Assistants of the Waterloo County Board of Education (Intervener)

3552-87-R: The University of Western Ontario Police Association (Applicant) v. The Canadian Guards Association (Respondent)

0009-88-R: United Food & Commercial Workers International Union AFL:CIO:CLC, Local 114P (Applicant) v. Prime Poultry Products Ltd. (Respondent) v. Group of Employees (Objectors)

0042-88-R: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Garcon Construction Inc. Division of John Garay & Associates Ltd., 361507 Ontario Ltd. (Respondents)

0047-88-R: Canadian Union of Public Employees (Applicant) v. Ontario Cancer Treatment & Research Foundation At Ottawa (Respondent)

0058-88-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Cashway Building Centres (Respondent)

0071-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Fish General Contractor Ltd. (Respondent)

0126-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. A. V. Concrete Forming Division of 767428 Ontario Ltd. (Respondent)

0160-88-R: Service Employees' International Union, Local 204, affiliated with the S.E.I.U., AFL:CIO:CLC (Applicant) v. The Glebe Rest Home Ltd. c.o.b. The Glebe Manor (Respondent)

0186-88-R: Ironworkers District Council of Ontario (Applicant) v. Creston Forming (Ont. Ltd.) (Respondent)

0200-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Averomar General Carpentry (Respondent)

0266-88-R: United Food & Commercial Workers International Union, AFL:CIO:CLC, Local 114P (Applicant) v. Swiss Chalet (Cara Operations Ltd.) (Respondent)

0292-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. McNamara Construction Company (A Division of George Wimpey Canada Ltd.) (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

3105-87-FC: United Brotherhood of Carpenters & Joiners of America, Local 2679 (Applicant) v. Pinehurst Woodworking Company Ltd. (Respondent) (*Dismissed*)

0157-88-FC: Labourers' International Union of North America, Local 1059 (Applicant) v. 643210 Ontario Inc. operated by M. Concrete Forming (Respondent) (*Granted*)

0243-88-FC: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Lincoln Carpentry Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2313-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Red Banner Developments Ltd. (Respondent) (*Withdrawn*)

2725-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. The Doncaster Group Ltd. c.o.b. as The Wycliffe Group Ltd. and/or Wycliffe Builders Ltd. and/or Wycliffe Builders (Doncrest) Ltd. (Respondents) (*Withdrawn*)

3475-87-R: Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers International Association, Local 537 (Applicants) v. Exanno Products Ltd., Nexus P.D.Q., a division of Shirlco Holdings Inc. (Respondents) (*Granted*)

SALE OF A BUSINESS

3006-87-R; 3007-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Norman Windover Plumbing & Heating and Norm Windover & Son Plumbing & Heating (Respondents) (*Granted*)

UNION SUCCESSOR RIGHTS

1493-87-R: United Food & Commercial Workers International Union, Local 326W (Applicant) v. B.C. Poly Grinders Inc. (Respondent) (*Granted*)

1499-87-R: United Food & Commercial Workers International Union, Local 522W (Applicant) v. The Board of Management of the Guild (Respondent) (*Granted*)

1502-87-R: United Food & Commercial Workers, Local 173W (Applicant) v. Canparts Automotive International Ltd. (Respondent) (*Granted*)

1538-87-R: United Food & Commercial Workers, Local 173W (Applicant) v. KOCH Transport Ltd. (Respondent) v. Group of Employees (Objectors) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2564-87-R: Vincent Macri (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 2679 (Respondent) v. Pinehurst Woodworking Company Ltd. (Intervener) (*Dismissed*)

2652-87-R: Ann Marie Autrey (Applicant) v. International Brotherhood of Electrical Workers, Local 2228 (Respondent) v. Filtran Ltd. (Intervener)

Unit: "all employees of Filtran Limited at its Nepean facility, save and except the following: office staff, sales staff, engineering and technical personnel on salary, foremen and persons above the rank of foreman, students and persons not regularly employed for more than 24 hours per week" (120 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	106
Number of persons who cast ballots	79
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	19
Number of ballots against respondent	59

2676-87-R: George E. Smith (Applicant) v. Energy & Chemical Workers Union, Local 9670(b) (Respondent) v. Servico Ltd./Ltée. (Intervener) v. Group of Employees (Objectors)

Unit #1: "all Service station employees of Servico Ltd./Ltée. at its Highway 401 Service Centre at Napanee, Ontario, save and except shift supervisors, persons above the rank of shift supervisor, persons working in restaurant and food services operations, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Granted*)

Number of names of persons on lists as originally prepared by employer	8
Number of persons who cast ballots	8
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	7

Unit #2: "all Service station employees of Servico Ltd./Ltée. at its Highway 401 Service Centre at Napanee, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except shift supervisors, persons above the rank of shift supervisor and persons working in restaurant and food services operations" (9 employees in unit) (*Granted*)

Number of persons on lists as originally prepared by employer	9
Number of persons who cast ballots	7
Number of ballots marked in favour of respondent	0
Number ballots marked against respondent	7

2711-87-R: Thomas Phelan (Applicant) v. Retail, Wholesale & Department Store Union, and its Local 1000 (Respondent) v. Sears Canada Inc. (Intervener) (*Dismissed*)

2712-87-R: Clayton E. Davis (Applicant) v. Aluminum, Brick & Glass Workers International Union & its Brantford Local 241 (Respondent) v. Farris Industries Canada - Division of Teledyne Industries Canada Ltd. (Intervener)

Unit: "all employees of the respondent at its Farris Industries Canada division in the City of Brantford, save and except supervisors, persons above the rank of supervisor, office and sales staff, and students employed during the school vacation period" (24 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	22
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	18

2886-87-R: Dale Bushey (Applicant) v. Teamsters Chauffeurs, Warehousemen & Helpers, Local 880, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent)

Unit: "all employees of the Corporation of the Town of Dresden, Board of Works, as are named in the Certification awarded by the Ontario Labour Relations Board, save and except foremen, persons above the rank of foreman and office staff" (4 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	3

2931-87-R: Jewan Datt (Applicant) v. United Steelworkers, Local 5264 (Respondent) v. W. A. Coleman Metal Products Ltd. (Intervener)

Unit: "all employees of the intervener working in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff" (51 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	42
Number of ballots marked in favour of respondent	15
Number of ballots marked against respondent	27

3229-87-R: Patrick O'Day (Applicant) v. Canadian Brotherhood of Railway, Transport & General Workers (Respondent) v. Can-Ar Transit Services, a Division of Tokmakjian Ltd. (Intervener)

Unit: "all full time transit drivers employed by Can-Ar Transit Services, a Division of Tokmakjian Ltd. at Thornhill, Toronto and Concord, Ontario" (16 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	17
Number of persons who cast ballots	16

Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	15
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	14

3237-87-R: Stephen A. Lillie (Applicant) v. United Steelworkers of America (Respondent) (*Granted*)

3385-87-R: Thakur Verma (Applicant) v. United Steelworkers of America (Respondent) v. Group of Employees (Objectors) (*Withdrawn*)

3416-87-R: Albert M. Dickinson et al. (Applicant) v. United Food & Commercial Workers, Local 1000A (Respondent) v. Norwich Packers Ltd. (Intervener) (*Granted*)

3420-87-R: Wayne Small on his own behalf and on behalf of the employees of Gould Paper Products Ltd. (Applicant) v. Retail, Wholesale & Department Store Union (Respondent) (*Granted*)

3459-87-R: John H. Serpell (Applicant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

3499-87-R: Walter Mikloska (Applicant) v. International Brotherhood of Electrical Workers, Local 804 (Respondent) (*Dismissed*)

3501-87-R: Joe Iturregui (Applicant) v. Labourers' International Union of North America, Local 1036 (Respondent) (*Dismissed*)

3505-87-R: Daniel Gagnon (Applicant) v. Toronto Printing Pressmen & Assistants Union, Local 10 (Respondent) (*Withdrawn*)

3513-87-R: Douglas Eastman (Applicant) v. International Brotherhood of Electrical Workers, Local 586 (Respondent) v. Lorne Bretzlaff (Intervener) (*Withdrawn*)

0193-88-R: Marcel Pruski (Applicant) v. International Brotherhood of Electrical Workers, Local 804 (Respondent) (*Dismissed*)

0247-88-R: Mr. Robert P. Voyer (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) (*Withdrawn*)

0272-88-R: Garry Tait (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 819 (Respondent) (*Withdrawn*)

0297-88-R: Walmarc Electric Ltd. (Applicant) v. International Brotherhood of Electrical Workers, Local 804 (Respondent) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0783-82-U: Orville Baldwin et al. (Complainant) v. William Howard and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, (Respondents) (*Withdrawn*)

3327-86-U: Ontario Public Service Employees Union (Complainant) v. Tenant Hotline Inc. (Respondent) (*Granted*)

3332-86-U: Michael Alfred Jones (Complainant) v. International Association of Heat & Frost Insulators & Asbestos Workers Union, Local 95 (Respondent) (*Granted*)

3471-86-U: Ontario Nurses' Association (Complainant) v. Central Park Lodges, A Division of Trizec Equities Ltd. (Respondent) (*Dismissed*)

0280-87-U; 0281-87-U: United Brotherhood of Carpenters & Joiners of America, Local 1030 (Applicant/Complainant) v. Nepean Roof Truss Ltd., Claude Ouellette, Hubert C. Steenbakkers (Respondents) (*Granted*)

0489-87-U: Rodney Pickles, Raymond Miller, Albert Johnson, Andre Orosz, Guissepe Grasso (Complainants) v. United Brotherhood of Carpenters & Joiners of America, Local 785 (Respondent) (*Dismissed*)

1041-87-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 1967 (Complainant) v. McDonnell Douglas Canada Ltd. (Respondent) (*Granted*)

1206-87-U: Graphic Communications International Union, Local 500M (Complainant) v. Curwood Packaging (Canada) Ltd. (Respondent) (*Withdrawn*)

1410-87-U: United Steelworkers of America (Complainant) v. Stackpole Ltd. (Respondent) (*Withdrawn*)

1550-87-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (Complainant) v. Voplex-Happich Corporation (Respondent) (*Dismissed*)

1585-87-U: Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Canadian Industrial Specialties Ltd. (Respondent) (*Withdrawn*)

1815-87-U: James Jefferson (Complainant) v. United Steelworkers of America, Local 2699 (Respondent) (*Dismissed*)

2005-87-U: Retail, Wholesale & Department Store Union, Local 414 (Complainant) v. The Canadian Tire Associate Store A. L. Brooks Ltd. (Respondent) (*Withdrawn*)

2690-87-U: Amalgamated Clothing & Textile Workers Union, and its Local 2508 (Complainant) v. Pavaco Plastics Inc. (Respondent) (*Dismissed*)

2751-87-U: Ontario Secondary School Teachers' Federation (Complainant) v. Hillfield-Strathallan College (Respondent) (*Withdrawn*)

2830-87-U: Leopold Morin (Complainant) v. Canadian Auto Workers National Union and Local 222 Oshawa (Respondents) v. General Motors of Canada Ltd. (Intervener) (*Dismissed*)

2831-87-U: Leopold Morin (Complainant) v. General Motors of Canada Ltd. (Respondent) (*Withdrawn*)

2857-87-U: Ontario Secondary School Teachers' Federation (Complainant) v. 548495 Ontario Ltd. c.o.b. The Kingston Learning Centre (Respondent) (*Withdrawn*)

2972-87-U: International Union of Operating Engineers, Local 793 (Complainant) v. Labourers' International Union of North America, Local 183, The Metropolitan Toronto Apartment Builders Association; and Schedule "A" attached hereto (Respondents) (*Withdrawn*)

3035-87-U: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Complainant) v. J.N.B. Plumbing & Heating (Respondent) (*Withdrawn*)

3082-87-U: United Brotherhood of Carpenters & Joiners of America, Local 3054 (Complainant) v. Huron Steel Fabricators (London) Ltd. (Respondent) (*Withdrawn*)

3087-87-U: Hernan Crespo (Complainant) v. Canadian Union of Public Employees (National Div.) and its Chartered C.U.P.E., Local 793 (University of Waterloo) (Respondents) (*Withdrawn*)

3098-87-U: Angela Cathanzaro (Complainant) v. CAW, Local 303 and Ken Whaung, G. S. Wooley Company (Respondent) (*Withdrawn*)

3104-87-U: United Steelworkers of America (Complainant) v. Bibby Ste. Croix Foundries Inc. (Respondent) (*Withdrawn*)

3114-87-U: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Complainant) v. Bankley Plumbing & Heating Ltd. and Norman Bankley (Respondent) (*Withdrawn*)

3127-87-U: Monte L. Hennessy (Complainant) v. Gay Construction Ltd. and Carpenters Union, Local 397 (Respondents) (*Withdrawn*)

3144-87-U: Joseph Robertson (Complainant) v. United Steel Workers of America, Local 7276 (Respondent) v. Phillips Cables Ltd. (Intervener) (*Withdrawn*)

3159-87-U: Syndicat des travailleurs de l'information du Droit (Complainant) v. Le Droit, division de groupe Unimédia Inc. (Respondent) (*Granted*)

3162-87-U: Ontario Public Service Employees union (Complainant) v. Whitby/Bowmanville Ambulance Service and Ministry of Health (Respondents) (*Dismissed*)

3178-87-U: United Brotherhood of Carpenters & Joiners of America, Local 3054 (Complainant) v. Huron Steel Fabricators (London) Ltd. (Respondents) (*Withdrawn*)

3212-87-U: Operative Plasterers & Cement Masons International Association of the United States & Canada, Local 598 (Complainant) v. Noranda Forest Sales Inc. (Respondent) (*Withdrawn*)

3288-87-U: Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. William O'Neill Construction Equipment Ltd. (Respondent) (*Withdrawn*)

3298-87-U: Canadian Union of Public Employees and its Local 3209 (Complainant) v. Lapalme Nursing Home (Respondent) (*Withdrawn*)

3317-87-U: Paul Carte (Complainant) v. U.E. Local 550 and Camco Inc. (Respondents) (*Withdrawn*)

3340-87-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. The Royal Brock Hotel Ltd. (Respondent) (*Withdrawn*)

3388-87-U: International Brotherhood of Electrical Workers, Local 1687 (Complainant) v. Orocon Inc. (Respondent) (*Withdrawn*)

3419-87-U: Conrad Salazar (Complainant) v. C.A.W. Local 200 and Frank McAnally, President (Respondent) (*Withdrawn*)

3463-87-U: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Fidelitas Holding Co. Ltd. and Otto Heberlein (Respondent) (*Withdrawn*)

3468-87-U: Mechanical Contractors Association Kitchener (Complainant) v. Mechanical Contractors Association of Ontario, W. J. McCarron and J. Seidner (Respondents) (*Withdrawn*)

3535-87-U: Sudbury Mine, Mill & Smelter Workers' Union, Local 598 (Complainant) v. E & R Jewell Contracting Ltd. (Respondent) (*Withdrawn*)

3540-87-U: Richard Picard (Complainant) v. General Motors Representatives and C.A.W. - Local 222 Representatives (Respondent) (*Withdrawn*)

3543-87-U: The Countryside Farms Ltd. (Complainant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Withdrawn*)

3549-87-U: Donna Bohnert, Mildred Mullins (Complainants) v. John Askins (Union Representative - Local 220) and Ruth Steinman (Union Chairperson - Local 220) (Respondents) (*Withdrawn*)

3558-87-U: Canadian Union of Public Employees (Complainant) v. William W. Creighton Centre (Respondent) (*Withdrawn*)

3575-87-U: Bakery, Confectionery and Tobacco Workers' International Union, Local 264 (Complainant) v. Pro Pastries Inc. (Respondent) (*Dismissed*)

3580-87-U: Canadian Paperworkers Union (Complainant) v. MacMillan Bloedel Ltd. Nipigon Division (Respondent) (*Withdrawn*)

3589-87-U: Labourers' International Union of North America, Local 527 (Complainant) v. New Look Restoration (Ottawa) Ltd. (Respondent) (*Withdrawn*)

3590-87-U: Canadian Union of Public Employees and its Local 1600 (Complainant) v. Board of Management of the Metropolitan Toronto Zoo (Respondent) (*Withdrawn*)

0006-88-U: United Food & Commercial Workers International Union (Complainant) v. Prime Poultry Products Ltd. (Respondent) (*Withdrawn*)

0050-88-U: Energy & Chemical Workers Union, Local 266 (Complainant) v. Roxul Company A Standard Industries Company Division of Lafarge Canada Inc. (Respondent) (*Withdrawn*)

0085-88-U: Canadian Union of Public Employees (Complainant) v. Corporation of the Town of Mount Forest (Respondent) (*Withdrawn*)

0096-88-U: Labourers' International Union of North America, Local 1089 (Complainant) v. Cashway Building Centres (Respondent) (*Withdrawn*)

0106-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. D.J.'s Nepean Taxi Company Ltd. (Respondent) (*Withdrawn*)

0113-88-U: Bob Flintoff (Complainant) v. Ted Williamson, Paul Judd, Brian McLelland (Company Officers), Wayne Murphy, Frank Taylor, John Lewis, John Graham (Union Officers) (Respondents) (*Withdrawn*)

0114-88-U: Manual Casamiro (Complainant) v. Ted Williamson, Paul Judd, Brian McLelland (Company Officers), Wayne Murphy, Frank Taylor, John Lewis, John Graham (Union Officers) (Respondents) (*Withdrawn*)

0139-88-U: Teamsters Local 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Today's Business Products Ltd. (Respondent) (*Withdrawn*)

0154-88-U: Allan & Marion Super Discount Marts Ltd. Allan Zaba President & Leslie Zaba General Manager (Complainant) v. United Steelworkers of America and Peggy McComb (Respondent) (*Withdrawn*)

0167-88-U: Edelmiro Vidal, Paul Atkinson (Complainants) v. Retail, Wholesale & Department Store Union, Local 414 and The Great Atlantic & Pacific Company, Ltd. (Respondents) (*Withdrawn*)

0181-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (Complainant) v. Custom Trim Ltd. (Respondent) (*Withdrawn*)

0185-88-U: Energy & Chemical workers Union (Complainant) v. Drummond Business Forms (1984) Ltd. (Respondent) (*Withdrawn*)

0268-88-U: United Steelworkers of America (Complainant) v. Steel Cylinder Manufacturing Ltd. (Respondent) (*Withdrawn*)

0276-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Willett Foods Inc. (Respondent) (*Withdrawn*)

0277-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC and its Local 1000 (Complainant) v. Sears Canada Inc. (Respondent) (*Dismissed*)

0327-88-U: George Woolsey (Complainant) v. Algoma Steel Corporation Ltd. (Respondent) (*Dismissed*)

0340-88-U: John Blodgett (Complainant) v. Motorways Direct (Oshawa terminal) (Respondent) (*Dismissed*)

0348-88-U: Mechanical Contractors Association of Ontario (Complainant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada (the 'U.A.'), The Ontario Pipe Trades Council of the U.A., Local 46 of the U.A., and the officers and agents of the aforesaid respondents including Sean O'Ryan, Chris Thurrot, Vince McNeil, Bill Weatherup, Mitch Griffiths, and the members of Local 46 of the U.A. (Respondents) (*Withdrawn*)

0410-88-U: Peter Charles Clare, 120 Victoria Avenue Cambridge, Ontario (Complainant) v. International Brotherhood of Teamsters, Local 879 (Respondent) (*Withdrawn*)

0423-88-U: Mechanical Contractors Association of Ontario, Watts & Henderson Ltd., State Contractors Inc. (Complainant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46, Sean O'Ryan, Mitch Griffiths and the members of the respondent local trade union employed by Watts & Henderson Ltd., Bill Weatherup, Members of the respondent local trade union employed by State Contractors Inc. (Respondents) (*Granted*)

0434-88-U: Toronto Transit Commission (Complainant) v. Amalgamated Transit Union, Local 113 and those persons named on Schedule "A" hereto (Respondent) (*Withdrawn*)

0439-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Nortown I.G.A. (Respondent) (*Withdrawn*)

0455-88-U: The Exolon-Esk Company of Canada, Ltd. (Complainant) v. Carl Smith, Joe Pisani et al. (Respondents) (*Withdrawn*)

0499-88-U: Ontario Refrigeration & Air Conditioning Contractors Association (O.R.A.C.) and The Maintenance & Service Contractors Association (M.S.C.A.) (Complainants) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787, Joe Carricato, Iain Elder, Tony Finelli, Bob Harford, John Homiak, Dan O'Brien, and J. Randy Pye (Respondents) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO PROSECUTE

0354-88-U: Lumber & Sawmill Workers Union, Local 2693 (Applicant) v. Gravel & Lake Services Ltd. (Respondent) (*Dismissed*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

0109-88-M: Dale Allen Warner (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers' Union of Canada (CAW-Canada) and its Local 1917 (Respondent Trade Union) v. VME Equipment of Canada Ltd. (Respondent Employer) (*Granted*)

JURISDICTIONAL DISPUTES

1113-84-JD: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Complainant) v. Delform Construction Ltd. and Labourers' International Union of North America, Local 183 (Respondents) v. Metropolitan Toronto Apartment Builders Association (Intervener #1) v. Form Work Council of Ontario (Intervener #2) v. Inducon Construction (Northern) Inc. and Inducon Development Corporation (Intervener #3) (*Withdrawn*)

2351-84-JD: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Complainant) v. Delform Construction Ltd., Inducon Development Ltd., Cooper Construction Ltd., and Labourers' International Union of North America, Local 183 (Respondents) v. Metropolitan Toronto Apartment Builders Association (Intervener #1) v. Form Work Council of Ontario (Intervener #2) (*Withdrawn*)

0209-85-JD: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 and Ironworkers District Council of Ontario (Complainants) v. Delform Construction Ltd., and H & R Developments and Labourers' International Union of North America, Local 183 (Respondents) v. Form Work Council of Ontario (Intervener) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1293-87-M: Ontario Nurses' Association (Applicant) v. Wellesley Hospital (Respondent) (*Withdrawn*)

2362-87-M: Canadian Union of Public Employees (Applicant) v. Board of Management of the Metropolitan Toronto Zoo (Respondent) (*Withdrawn*)

545-87-M: Greater Northern Ontario Trucking Association (Applicant) v. Ethier Sand & Gravel Ltd. (Respondent) (*Withdrawn*)

3024-87-M: Labourers' International Union of North America, Local 183 (Applicant) v. Wanzl Manufacturing Inc. (Respondent) (*Granted*)

3051-87-M: Middlesex-London District Health Unit (Applicant) v. Canadian Union of Public Employees, Local 101 (Respondent) (*Withdrawn*)

3125-87-M: Ontario Public Service Employees Union, Local 260 (Applicant) v. Niagara South Board of Education (Respondent) (*Withdrawn*)

0253-88-M: International Union of Operating Engineers, Local 793 (Applicant) v. Placer Dome Inc.; Hutchinson Contracting Co. Ltd.; Hugh Munro Construction Ltd.; Buus Construction Ltd.; Westland Construction Ltd.; and MacIsaac Mining & Tunneling Company (Respondents) (*Granted*)

03970-88-M: Ontario Nurses' Association (Applicant) v. Cottage Hospital (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

1482-87-OH: Les Kralik & Alex Faulds, Acting Safety Chairperson for Local 1967 C.A.W. (Complainants) v. McDonnell Douglas Canada Ltd. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

0774-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Honco Steele Builders (Respondent) (*Withdrawn*)

0977-87-G: International Brotherhood of Electrical Workers, Locals 586 & 594 (Applicants) v. 291360 Ontario Ltd. c.o.b. as Lorne's Electric (Respondent) (*Granted*)

1317-87-G; 1318-87-G: Lake Ontario District Council, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Jack Law Contractors Ltd., Jack Law Contractors Inc., Jack Law Construction Ltd., Law Construction & Jack Alvin Law (Respondent) (*Withdrawn*)

1378-87-G: Ontario Council of the International Brotherhood of Painters & Allied Trades, International Brotherhood of Painters & Allied Trades, Local 220 (Applicant) v. Bob Cinkant Painting Ltd. and M & S Contracting Services Ltd. (Respondent) (*Granted*)

1451-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. West York Construction (1984) Ltd. (Respondent) (*Granted*)

1590-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. R. Reusse Co. Ltd. (Respondent) (*Dismissed*)

2215-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. A. Reisman Construction Ltd. (Respondent) (*Granted*)

2606-87-G: United Brotherhood of Carpenters & Joiners of America, Local 1988 (Applicant) v. Ross Construction Services, a division of 634272 Ontario Ltd. & Ross Recycling Ltd. (Respondents) (*Withdrawn*)

2890-87-G; 0041-88-G: Labourers' International Union of North America, Local 1089 (Applicant) v. Teperman & Sons Inc. (Respondent) (*Withdrawn*)

3005-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Norman Windover Plumbing & Heating and Norm Windover & Son Plumbing & Heating (Respondents) (*Granted*)

3046-87-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Cansteel Structural Company, a Division of 293599 Ontario Inc. (Respondent) (*Granted*)

3130-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. James A. Rice Ltd. (Respondent) (*Withdrawn*)

3271-87-G: Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. Domingo's Contractor Carpenters (593601 Ont. Ltd.) (Respondent) (*Granted*)

3319-87-G: Ontario Allied Construction Trades Council on its own behalf and on behalf of United Brotherhood of Carpenters & Joiners of America, Lake Ontario District Council (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

3358-87-G: Ontario Allied Construction Trades Council and Labourers' International Union of North America, Local 1059 (Applicant) v. Bill Albert Tree Service (Respondent) (*Withdrawn*)

3401-87-G: Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. Cancian Bros. Ltd. (Respondent) (*Withdrawn*)

3408-87-G: Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. D. Gambini Carpenters (Respondent) (*Withdrawn*)

3410-87-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Commonwealth Construction Company Ltd. (Respondent) (*Withdrawn*)

3477-87-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Nick Giambardino Bros. Ltd. (Respondent) (*Withdrawn*)

3479-87-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Pino Drywall Construction Ltd. (Respondent) (*Withdrawn*)

3560-87-G: Resilient Floorworkers, Local 2965, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Wentworth Tile & Terrazzo Ltd. (Respondent) (*Granted*)

3561-87-G: Resilient Floorworkers, Local 2965, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Tapis Tanguay Inc. (Respondent) (*Granted*)

3582-87-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Commonwealth Construction Company Ltd. (Respondent) (*Dismissed*)

0034-88-G: Masonry Contractors Association of Toronto Inc. (Applicant) v. The Bricklayers, Masons Independent Union of Canada, Local 1 (Respondent) (*Granted*)

0060-88-G: Labourers' International Union of North America, Local 247 (Applicant) v. Denis Brisbois Contractor Ltd. (Respondent) (*Withdrawn*)

0129-88-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Phil Fletcher Contracting Ltd. (Respondent) (*Granted*)

0130-88-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Bruce (E D P) Services (Respondent) (*Withdrawn*)

0131-88-G; 0132-88-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. McCall Contractors Inc. (Respondent) (*Withdrawn*)

0170-88-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Da Cunha Masonry Contractors Ltd. (Respondent) (*Granted*)

0177-88-G: Resilient Floorworkers, Local 2965, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Kal Group Co. (Respondent) (*Granted*)

0223-88-G: Teamsters, Local 230, Ready Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers (Applicant) v. B & L Gottardo Bros. Excavating Ltd. (Respondent) (*Withdrawn*)

0230-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Sebco Construction Ltd. (Respondent) (*Withdrawn*)

0231-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Melo Landscaping Ltd. (Respondent) (*Withdrawn*)

0233-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Grimaldi & Montanari Ltd. (Respondent) (*Withdrawn*)

0235-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. D & R Ventura General Construction Ltd. (Respondent) (*Withdrawn*)

0249-88-G: Labourers' International Union of North America, Local 27 (Applicant) v. Joe Bancheri Carpentry (Respondent) (*Granted*)

0254-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. G.M. Paving 1985 Ltd. (Respondent) (*Withdrawn*)

0255-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Domura Construction Ltd. (Respondent) (*Withdrawn*)

0257-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. San-Lee Construction Ltd. (Respondent) (*Withdrawn*)

0258-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Conbora Forming Ltd. (Respondent) (*Withdrawn*)

0259-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Stradel Contracting Ltd. (Respondent) (*Withdrawn*)

0260-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Solid Wall Concrete Forming Ltd. (Respondent) (*Withdrawn*)

0261-88-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ike Paving & Constr. Ltd. Asphalt & Concrete Works (Respondent) (*Withdrawn*)

0309-88-G: Drywall, Acoustic, Lathing & Insulation, Local 675 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Granolite Company Ltd. (Respondent) (*Withdrawn*)

0314-88-G: Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 200 (Applicant) v. Commercial Glass & Aluminum (Respondent) (*Granted*)

0377-88-G: International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Applicant) v. Terron Mechanical Ltd. (Respondent) (*Granted*)

0412-88-G: International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. Landar Insulation Corporation Ltd. (Respondent) (*Withdrawn*)

0430-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. D.M.S. Masonry Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0995-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Donegan's Haulage Ltd. (Respondent) (*Dismissed*)

1284-87-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Pacific West Industrial Installation Ltd. (Respondent) (*Dismissed*)

1629-87-U: Canadian Union of Public Employees (Complainant) v. University of Toronto (Respondent) (*Dismissed*)

1894-87-R: Operative Plasterers & Cement Masons International Association of the United States & Canada, Local 598 (Applicant) v. Noranda Forest Sales Inc. (Respondent) (*Granted*)

2126-87-G: Labourers' International Union of North America, Local 1089 (Applicant) v. Teperman & Sons Inc. (Respondent) (*Dismissed*)

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